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No. 12721

United States
Court of Appeals
for the Ninth Circuit.

L. P. ST. CLAIR and ANNASTATIA ST. CLAIR,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Transcript of Record

Appeals from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Division

Civil No. 9711-Y

L. P. ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO RECOVER PERSONAL IN-
COME TAXES ILLEGALLY ASSESSED
AND COLLECTED

L. P. St. Clair, plaintiff herein, complains of the
United States of America, a Sovereign Power, de-
fendant, and for cause of action alleges:

Count One

I.

That plaintiff is an individual who at all times
herein mentioned resided in the City of Los An-
geles, State of California, and in the Southern Dis-
trict of California, Central Division.

II.

That the Internal Revenue (Income) Taxes
sought to be recovered herein were paid in quar-
terly installments as follows:

March 15, 1940	\$1,074.94
June 15, 1940	1,074.93
September 15, 1940	1,074.94
December 15, 1940	1,074.94

Total\$4,299.75

Said taxes were paid to Nat Rogan, an officer of the Government of the United States, the duly appointed and acting Collector of Internal Revenue for the Sixth Collection District of California. That Nat Rogan is not now and has not since June 30, 1943, been acting in the capacity of Collector of Internal Revenue for said Sixth Internal Revenue Collection District of California.

III.

That jurisdiction of this court over the matters herein related exists by virtue of United States Code, Title 28, Section 1346.

IV.

That at all times herein mentioned plaintiff and his wife Annastatia St. Clair were the equal co-owners of 300 shares of the common capital stock of the St. Clair Estate Company, a California corporation.

V.

That on or about December 23, 1938, said St. Clair Estate Company adopted a plan of complete liquidation and dissolution. That thereafter and on January 10, 1939, pursuant to petition of one of the shareholders of said corporation, the Superior Court in and for Kern County, California, assumed jurisdiction over the affairs of said corporation to supervise the winding up of said corporation, the distribution of its assets in final and complete liquidation and the dissolution thereof according to said plan. That pursuant to said plan of complete

liquidation and the applicable law of the State of California relating thereto, the officers of said corporation filed with the Secretary of State for California a certificate of election to wind up and dissolve said corporation.

VI.

That at all times herein mentioned said St. Clair Estate Company has remained under the jurisdiction of said Superior Court in and for Kern County, California, and said court has continued to supervise the winding up and dissolution of said corporation under and pursuant to the laws of the State of California.

VII.

That during the calendar year 1939 the St. Clair Estate Company distributed to its shareholders, pursuant to said plan of complete liquidation adopted [3*] December 23, 1938, and in obedience to orders of said Superior Court in and for Kern County, the sum of \$47,000.00. That plaintiff, as shareholder, received as his portion of said distribution the sum of \$5,875.00.

VIII.

That the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the St. Clair Estate Company asserting a deficiency of peronal holding company surtax against said corporation for the calendar year 1939 on the ground that the distributions made by it during the year 1939 constituted distributions in complete liquidation of said corporation which did

* Page numbering appearing at foot of page of original Reporter's Transcript of Record.

not qualify it for a dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (*St. Clair Estate Company v. Commissioner*, Docket No. 109162, 9 T.C. 392) that said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1939 by virtue of Section 27(g) Internal Revenue Code (26 U. S. C. Section 27(g)) entitled "Distributions in Liquidation." That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

That within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California his separate Federal income tax return for the year 1939 on Treasury Department Form 1040. That the gross income reported thereon was in the amount of \$41,218.43; the total deductions in the amount of \$9,291.25; the net income in the amount of \$31,927.18, and the total tax in the amount of \$4,299.75. That plaintiff erroneously and illegally included within his gross income reported as afore-said the sum of \$5,875.00 constituting the amount received by him during the calendar year 1939 as his share of the distribution made by the St. Clair Estate Company pursuant to said plan of complete

liquidation hereinabove mentioned in paragraph VII. That no portion of said \$5,875.00 constituted income or gain taxable to plaintiff in that or any other year. [4]

X.

That thereafter and within the time required by law, to wit, on March 3, 1943, the plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim for refund on Treasury Department Form 843 demanding recovery of the sum of \$1,327.19, income tax erroneously and illegally overpaid for the calendar year 1930 by reason of plaintiff's having included in gross income for that year said sum of \$5,875.00. That thereafter, by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff, pursuant to section 3772(a) (2) of the Internal Revenue Code (Title 26, U. S. C., section 3772(a)(2)) that his claim for refund was disallowed.

XI.

That all conditions precedent to the proper institution of this action have been performed or have occurred.

XII.

Wherefore, plaintiff prays judgment in the sum of \$1,327.19, together with statutory interest thereon from the date of overpayment.

Count Two

I.

That plaintiff is an individual all times herein mentioned residing in the City of Los Angeles, State of California, and in the Southern District of California, Central Division.

II.

That the Internal Revenue (Income) Taxes in the amount of \$5,791.85 sought to be recovered herein were paid in quarterly installments on March 15, June 15, September 15 and December 15 in the year 1941 to Nat Rogan, an officer of the Government of the United States, the duly appointed and acting Collector of Internal Revenue for the Sixth Collection District of California. That Nat Rogan is not now and has not since June 30, 1943, been acting in the capacity of Collector of Internal Revenue for said Sixth Internal Revenue Collection District of California.

III.

That jurisdiction of this court over the matters herein related exists [5] by virtue of United States Code, Title 28, Section 1346.

IV.

That at all times herein mentioned plaintiff and his wife, Annastatia St. Clair, were the equal co-owners of 300 shares of the common capital stock of the St. Clair Estate Company, a California corporation.

V.

That on or about December 23, 1938, said St. Clair Estate Company adopted a plan of complete liquidation and dissolution. Thereafter, and on January 10, 1939, pursuant to petition of one of the shareholders of said corporation, the Superior Court in and for Kern County, California, assumed jurisdiction over the affairs of said corporation to supervise the winding up of said corporation, the distribution of its assets in final and complete liquidation, and the dissolution thereof according to said plan. That pursuant to said plan of complete liquidation and the applicable law of the State of California relating thereto, the officers of said corporation filed with the Secretary of State for California a certificate of election to wind up and dissolve said corporation.

VI.

That at all times herein mentioned said St. Clair Estate Company has remained under the jurisdiction of said Superior Court in and for Kern County, California, which court has continued to supervise the winding up and dissolution of said corporation under and pursuant to the laws of the State of California.

VII.

That during the calendar year 1940 the St. Clair Estate Company distributed to its shareholders, pursuant to said plan of complete liquidation adopted December 23, 1938, and in obedience to orders of said Superior Court in and for Kern

County, the sum of \$26,000.00. That plaintiff, as shareholder, received as his share of said distribution the sum of \$3,250.00.

VIII.

That the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1940 on the ground that the distributions made by it during the year 1940 [6] constituted distributions in liquidation which did not qualify it for a dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (Docket No. 109162, 9 T.C. 392) that said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1940 by virtue of Section 27(g) Internal Revenue Code (26 U. S. C. Sec. 27(g)) entitled "Distribution in Liquidation." That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

That within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California his separate Federal income tax return for

the year 1940 on Treasury Department Form 1040. That the gross income reported thereon was in the amount of \$38,442.87; the total deductions in the amount of \$8,968.41; the net income in the amount of \$29,474.46, and the total income and defense taxes in the amount of \$5,791.85. That plaintiff erroneously and illegally included within his gross income reported as aforesaid the sum of \$3,250.00 constituting the amount received by him during the calendar year 1940 as his share of the distribution made by the St. Clair Estate Company pursuant to said plan of complete liquidation as set forth hereinabove in paragraph VII. That no portion of said \$3,250.00 constituted income or gain taxable to plaintiff.

X.

That thereafter and within the time required by law, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim for refund on Treasury Department Form 843, demanding recovery of the sum of \$1,189.91 income and defense tax erroneously and illegally overpaid for the calendar year 1940 by reason of plaintiff's having included in gross income for that year said sum of \$3,250.00. That thereafter, by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff, pursuant to Section 3722(a)(2) of the Internal Revenue Code (Title 26 U.S.C. Sec. 3772(a)(2)) that his claim for refund was disallowed.

XI.

That all conditions precedent to the proper institution of this action have been performed or have occurred.

XII.

Wherefore, plaintiff prays judgment in the sum of \$1,189.91, together with statutory interest thereon from the date of overpayment.

Dated this 4th day of March, 1949.

/s/ THOMAS R. DEMPSEY,

/s/ WELLMAN P. THAYER,

/s/ ARTHUR H. DEIBERT,

/s/ WILLIAM L. KUMLER,

/s/ H. B. THOMPSON.

State of California,
County of Los Angeles—ss.

L. P. St. Clair, being first duly sworn, deposes and says: That he is the plaintiff named in the foregoing complaint; that he has read the said complaint and knows the contents thereof and that the same is true of his own knowledge, except the matters which are therein stated to be upon information and belief, and that as to those matters he believes it to be true.

/s/ L. P. ST. CLAIR.

Subscribed and sworn to before me this 4th day of March, 1949.

[Seal] /s/ MELBA S. DEEMING,
Notary Public in and for
Said County and State.

[Endorsed]: Filed May 20, 1949. [8]

[Title of District Court and Cause.]

No. 9711-Y Civil

ANSWER

Comes now the defendant, above-named, and in answer to plaintiff's complaint, admits, denies and alleges:

Count One

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Admits the allegations contained in paragraph IV thereof.

V.

The allegations contained in paragraph V of Count One of the complaint are denied except it is admitted that on December 22, 1938, Cora St. Clair, beneficial owner of one-fourth of the stock of the

St. Clair Estate Company, commenced an action for the dissolution of the St. Clair Estate Company and for [9] an accounting; that on December 23, 1938, the directors of the St. Clair Estate Company adopted resolutions providing for the winding up of the affairs of that company and its voluntary dissolution; that on January 10, 1939, Cora St. Clair instituted an action in the Superior Court in and for Kern County, California, in which she asked for court supervision of the winding up of the affairs of the St. Clair Estate Company; and that that court entered an order that no distribution should be made of the assets or property of the St. Clair Estate Company, other than in the ordinary course of business, except by order of the court.

VI.

The allegations contained in paragraph VI of count one of the complaint are denied except it is admitted that at all times material herein the St. Clair Estate Company remained under the jurisdiction of the Superior Court in and for Kern County, California.

VII.

The allegations contained in paragraph VII of count one of the complaint are denied except it is admitted that during the calendar year 1939 the St. Clair Estate Company distributed to its shareholders, in obedience to the orders of the Superior Court in and for Kern County, California, the sum of \$47,000.00, and that plaintiff, as shareholder, received as his portion thereof the sum of \$5,875.00.

VIII.

The allegations contained in paragraph VIII of count one of the complaint are denied except it is admitted that the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1939 on the ground that the distributions made by it during the year 1939 constituted distributions in complete liquidation of said corporation which did not qualify it for a dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (*St. Clair Estate Company v. Commissioner*, Docket No. 109162, 9 T. C. 392) that said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1939. [10] That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decisions of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

The allegations contained in paragraph IX of count one of the complaint are denied except it is admitted that within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of Cali-

for his separate federal income tax return for the year 1939 on Treasury Department Form 1040. That the gross income reported thereon was in the amount of \$41,218.43. The total deductions were in the amount of \$9,291.25. The net income was in the amount of \$31,927.18, and the total tax was in the amount of \$4,299.75.

X.

The allegations contained in paragraph X of count one of the complaint are denied except it is admitted that on March 6, 1943, the plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim for refund of \$1,327.19 paid as income tax for the calendar year 1939; that by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff that his claim for refund was disallowed.

XI.

The allegations contained in paragraph XI of count one of the complaint are denied.

Count Two

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Admits the allegations contained in paragraph IV thereof. [11]

V.

The allegations contained in paragraph V of count two of the complaint are denied except it is admitted that on December 22, 1938, Cora St. Clair, beneficial owner of one-fourth of the stock of the St. Clair Estate Company, commenced an action for the dissolution of the St. Clair Estate Company and for an accounting; that on December 23, 1938, the directors of the St. Clair Estate Company adopted resolutions providing for the winding up of the affairs of that company and its voluntary dissolution; that on January 10, 1939, Cora St. Clair instituted an action in the Superior Court in and for Kern County, California, in which she asked for court supervision of the winding up of the affairs of the St. Clair Estate Company; and that that court entered an order that no distribution should be made of the assets or property of the St. Clair Estate Company, other than in the ordinary course of business, except by order of the court.

VI.

The allegations contained in paragraph VI of count two of the complaint are denied except it is admitted that at all time material herein the St. Clair Estate Company remained under the jurisdiction of the Superior Court in and for Kern County, California.

VII.

The allegations contained in paragraph VII of count two of the complaint are denied except it is admitted that during the calendar year 1940 the St. Clair Estate Company distributed to its shareholders in obedience to the orders of the Superior Court in and for Kern County, California, the sum of \$26,000.00, and that plaintiff, as shareholder, received as his portion thereof the sum of \$3,250.00.

VIII.

The allegations contained in paragraph VIII of the second count of the complaint are denied except it is admitted that the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1940 on the ground that the distributions made by it during the year 1940 constituted distributions in [12] liquidation which did not qualify it for a dividend paid credit because entirely paid out capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (Docket No. 109162, 9 T. C. 392) that said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1940. That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

The allegations contained in paragraph IX of count two of the complaint are denied except it is admitted that within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California his separate federal income tax return for the year 1940 on Treasury Department form 1040. That the gross income reported thereon was in the amount of \$38,442.87. The total deductions were in the amount of \$8,968.41. The net income was in the amount of \$29,474.46, and the total income and defense taxes in the amount of \$5,791.85.

X.

The allegations contained in paragraph X of count two of the complaint are denied except it is admitted that on March 6, 1943, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim for refund of the sum of \$1,189.91 paid as income and defense tax for the calendar year 1940, and that by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff that his claim for refund was disallowed.

XI.

The allegations contained in paragraph XI of count two of the complaint are denied.

Wherefore, having fully answered, defendant prays for judgment dismissing the complaint, to-

gether with costs and disbursements of this action.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Asst. U. S. Attys.

EUGENE HARPOLE,
Special Attorney, Bureau
of Internal Revenue.

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 21, 1949. [13]

[Title of District Court and Cause.]

No. 9711-Y Civil

MOTION AND ORDER TO CONSOLIDATE
FOR TRIAL

Plaintiff, L. P. St. Clair, by his attorney, H. B. Thompson, moves that this cause be consolidated for trial with case number 9712-Y, entitled Annastatia St. Clair, Plaintiff vs. United States of America, Defendant, now pending in this Court, on the ground that the facts and issue of law here involved are the same as in that case.

Defendant, United States of America, joins in this motion.

DEMPSEY, THAYER,

DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,

Attorney for Plaintiff.

ERNEST TOLIN,

United States Attorney,

E. H. MITCHELL,

Assistant U. S. Attorney,

EDWARD R. McHALE,

Assistant U. S. Attorney,

EUGENE HARPOLE,

JAMES D. PETTUS,

Special Attorneys, Bureau
of Internal Revenue.

By /s/ JAMES D. PETTUS,

Attorneys for United States
of America, Defendant.

It Is So Ordered:

/s/ LEON R. YANKWICH,

Judge.

[Endorsed]: Filed March 28, 1950. [15]

In the United States District Court, Southern District of California, Central Division

No. 9711-Y

Honorable Leon R. Yankwich, Judge.

L. P. ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

MEMORANDUM DECISION

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the defendant that plaintiff take nothing by the Complaint. Costs to the defendant.

Comment

I am of the view that the Commissioner of Internal Revenue correctly interpreted the payments made to the plaintiff by the St. Clair Estate Company in 1939 and 1940 as dividends payable at ordinary rates, and not as partial distributions in liquidation.

The question is purely one of fact, to be determined from an examination of the undisputed record and facts in the case. Whatever conflicting attitudes the Commissioner took before the tax court regarding the nature of these payments, cannot alter the factual situation found to exist. [16]

The important fact is that the resolution of the directors of the corporation, dated December 23,

1938, proposing a liquidation of the corporation, and the meeting of the shareholders on December 23, 1938, adopting a plan of liquidation, were stayed in their effect by the institution of proceedings by Cora St. Clair and the injunction issued on December 23, 1938.

The injunction restrained the corporation and directors from "altering, removing, disposing of and destroying any of the books, records, books of account, property or assets of the St. Clair Corporation."

Pending the determination of this lawsuit, neither the corporation nor its directors could take any action towards such disposition of the property as a "winding up" would require. The subsequent institution by the corporation of an action in the same Superior Court seeking the court's assistance in winding up the affairs of the corporation were of no effect as a liquidation. The sister's lawsuit tied up the corpus of the estate until the rights of the three members of the family were adjudicated. And the Superior Court in the "dissolution action" (if we may call it such), could not proceed with any pattern of liquidation of the corpus of the estate until those rights were determined. At most, it could, and did allow, the income to be distributed to the shareholders, in so far as it was not affected by the ultimate outcome of the suit of Cora St. Clair. The only orders of distribution which the Court made were orders distributing current earnings, which were designated as such in every instance.

Illustrative is the Order of April 28, 1939, (Exhibit E, page 2), which recites that the order sought is an order authorizing and directing the St. Clair Estate Co. to pay to its stockholders the total sum of \$24,000.00 which [17] is to be charged "against said stockholders' accounts on the books of the St. Clair Estate."

On June 4, 1940, payments were ordered made "out of earnings of 1940." Similar phrasing appears in the orders of October 3, 1940, and October 26, 1940. On October 13, 1939, the Court, in the dissolution proceeding, entered an order significantly entitled "Order Construing Order of Distribution of April 28, 1939," in which it was stated: "It is hereby ordered that the order of distribution heretofore made herein on the 28th day of April, 1939, is hereby construed to be a distribution and payment of the sum of Twenty-four Thousand Dollars (\$24,000.00), Six Thousand Dollars (\$6,000.00) to each stockholder, from the income of St. Clair Estate Company, rather than from its capital assets." Following this interpretative order, the order of December 26, 1939, uses this language: "That the Board of Directors of St. Clair Estate Company and said St. Clair Estate Company be and they are hereby authorized and directed to declare and pay to the stockholders of St. Clair Estate Company as dividends, in the calendar year 1939, amounts up to the net earnings of said corporation for the year 1939 and any temporary restraining order or injunction prohibiting such action may be accordingly modified to permit such action."

At these various hearings, the value of the assets of the corporation was stated at around a quarter million dollars and the Minutes so recited. (Exhibit E, page 1) It may be conceded that the name given to a payment is not conclusive. But here we have the same court in which the two proceedings are pending proceeding to make payments in a "winding-up" proceeding, knowing full well that the corpus of the estate cannot be distributed until the suit [18] of one of the three members of the family is decided by final judgment—a suit in which the corporation which seeks to have its affairs wound up has been enjoined from disposing of the corpus of the estate. And the Court recognized the binding effect of the injunction by modifying it to the extent of permitting the payment of profits only. Rightly. For, under the circumstances, the Court was required not only by its own injunctive order, but by the dictates of ordinary judicial prudence, to see that the corpus of the Estate was not touched. So that, whatever distribution was made of moneys earned by the Estate, and only after the litigation between the three stockholders was finally settled would the Court determine and approve the manner of liquidation and order it carried into effect.

At times, of course, if the money distributed actually bears a significant relation to the body of the Estate, an intention to make a distribution *chemin faisant* (as they go along), as the French say, might be inferred. This is what the courts call "a step in the process of complete litigation." (Cf. *Letts v. Commissioner*, 1936, C. A. 9, 84 F(2) 760; *Florence M. Quinn*, 1937, 35 T. A. 412.) But the few thou-

said dollars distributed here were so insignificant when compared with the value of the Estate, and were so plainly earmarked as derived from and limited to the current profits, that a conclusion that they were intended as a partial liquidation would be unrealistic. (See, Mertens, Law of Federal Income Taxation, Sec. 9.83; *Tootle v. Commissioner*, 1932, C. A. 8, 58 F(2) 576; *Holmby Corp. v. Commissioner*, 1936, C. A. 9, 83 F(2) 548; *Jones v. Dawson*, 1945, C. A. 10, 148 F(2) 87.) We would be giving effect as fact to what may be clearly an afterthought to obtain an advantage which did not occur at the time. In all tax [19] matters, the acts of the parties at the time when their possible effect upon taxability was not uppermost in their minds speak more eloquently than subsequent attempts to place their action in a different light in order to achieve a certain tax result. (See, *Pacific Magnesium Inc. v. Westover*, 1949, D. C. Cal., 86 F. Supp. 644, 649.)

It follows that the Commissioner was right in his determination.

Hence the ruling above made.

As all the facts are covered by stipulations, they may stand as the Court's Findings, and only Conclusions of Law and Judgment need be prepared by counsel for the defendant, unless both counsel prefer to prepare formal Findings.

Dated this 15th day of May, 1950.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed May 15, 1950 [20]

[Title of District Court and Cause.]

No. 9711-Y Civil

CONCLUSIONS OF LAW

The above-entitled case came on regularly for trial on May 8, 1950, before the Court sitting without a jury; plaintiff appearing by his attorney, Dempsey, Thayer, Deibert and Kumler and H. Ben Thompson, Esquire, and the defendant appearing by Ernest A. Tolin, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said district; and evidence documentary and stipulations of facts having been received, and briefs having been filed by both parties; and oral argument having been made by both parties and the Court having fully considered the same from the facts the Court concludes:

I.

The question whether the payments made by the St. Clair Estate Company to the plaintiff during the calendar years 1939 and 1940 were ordinary dividends or dividends in complete or partial liquidation is purely one of fact. [21]

II.

The payments made during the calendar years 1939 and 1940 by the St. Clair Estate Company to the plaintiff were dividends taxable at ordinary rates.

III.

The distributions to the plaintiff which the Su-

perior Court of Kern County, California, ordered during the years 1939 and 1940 were of current earnings only.

IV.

The corpus of the St. Clair Estate Company could not have been distributed and was not distributed until the judgment in the action brought by Cora St. Clair for an accounting of the assets of the St. Clair Estate Company became final on January 18, 1945.

V.

The plaintiff has not overcome the burden of showing that the Commissioner's determination that the payments made by the St. Clair Estate Company to plaintiff in 1939 and 1940 were dividends taxable at ordinary rates and not distributions either in partial or complete liquidation was erroneous.

VI.

The defendant is entitled to judgment that the plaintiff take nothing and for its costs.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form, as required by Rule 7(a).
Dated: July 28, 1950.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorneys for Plaintiff.

[Endorsed]: Filed July 28, 1950. [22]

In the United States District Court in and for the
Southern District of California, Central Division

No. 9711-Y Civil

L. P. ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled case came on regularly for trial on May 8, 1950, before the Court, sitting without a jury; plaintiff appearing by his attorney, Dempsey, Thayer, Deibert and Kumler and H. Ben Thompson, Esquire, and the defendant appearing by Ernest A. Tolin, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said district. Evidence documentary was received and the cause was thereupon submitted to the Court upon two stipulations of facts signed by attorneys for the parties hereto. Briefs were filed on behalf of the parties hereto. Thereafter, the Court, having fully considered the facts and the briefs and being fully advised in the premises, ordered preparation of the Conclusions of Law and Judgment.

Wherefore, by reason of law and the evidence and the stipulations of facts and Conclusions of Law of the Court which have been filed and the premises aforesaid, [23]

It Is Ordered, Adjudged and Decreed and this does order, adjudge and decree that the plaintiff take nothing, and that the defendant have and recover of and from the plaintiff its costs in this behalf expended, hereby taxed in the sum of \$20.00.

Dated this 28th day of July, 1950.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form, as required by Rule 7(a).
Dated: July 28, 1950.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorneys for Plaintiff.

Judgment entered July 31, 1950. [24]

[Endorsed]: Filed July 28, 1950.

In the District Court of the United States for the
Southern District of California, Central Division

Civil No. 9712-Y

ANNASTATIA ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT TO RECOVER PERSONAL IN-
COME TAXES ILLEGALLY ASSESSED
AND COLLECTED

Annastatia St. Clair, plaintiff herein, complains
of the United States of America, a Sovereign
Power, defendant, and for cause of action alleges:

Count One

I.

That plaintiff is an individual who at all times
herein mentioned resided in the City of Los Angeles,
State of California and in the Southern District of
California, Central Division.

II.

That the Internal Revenue (Income) Taxes
sought to be recovered herein were paid in quar-
terly installments on the 15th day of March, June,
September and December, 1940, and the total amount
of said tax paid was \$3,941.35. Said taxes were paid
to Nat Rogan, an officer of the Government of the
United States, the duly appointed and acting Col-

lector of Internal Revenue for the Sixth Collection District of California. That Nat Rogan is not now and has not since June 30, 1943, been acting in the capacity of Collector of Internal Revenue for said Sixth Internal Revenue Collection District of California.

III.

That jurisdiction of this court over the matters herein related exists by virtue of United States Code, Title 28, Section 1346.

IV.

That at all times herein mentioned plaintiff and her husband, L. P. St. Clair, were the equal co-owners of 300 shares of the common capital stock of the St Clair Estate Company, a California corporation.

V.

That on or about December 23, 1938, said St. Clair Estate Company adopted a plan of complete liquidation and dissolution. That thereafter and on January 10, 1939, pursuant to petition of one of the shareholders of said corporation, the Superior Court in and for Kern County, California, assumed jurisdiction over the affairs of said corporation to supervise the winding up of said corporation, the distribution of its assets in final and complete liquidation and the dissolution thereof according to said plan. That pursuant to said plan of complete liquidation and the applicable law of the State of California relating thereto, the officers of said corporation filed with the Secretary of State for California a cer-

tificate of election to wind up and dissolve said corporation.

VI.

That at all times herein mentioned said St. Clair Estate Company has remained under the jurisdiction of said Superior Court in and for Kern County, California, and said court has continued to supervise the winding up and dissolution of said corporation under and pursuant to the laws of the State of California.

VII.

That during the calendar year 1939 the St. Clair Estate Company distributed to its shareholders, pursuant to said plan of complete liquidation adopted December 23, 1938, and in obedience to orders of said Superior Court in and for Kern County, the sum of \$47,000.00. That plaintiff, as shareholder, received as her portion of said distribution the sum of \$5,875.00. [27]

VIII.

That the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1939 on the ground that the distributions made by it during the year 1939 constituted distributions in complete liquidation of said corporation which did not qualify it for a dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (St. Clair Estate Com-

pany v. Commissioner, Docket No. 109162, 9 T.C. 392) that said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1939 by virtue of Section 27(g) Internal Revenue Code (26 U.S.C. Section 27(g)) entitled "Distributions in Liquidation." That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

That within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California her separate Federal income tax return for the year 1939 on Treasury Department Form 1040. That the gross income reported thereon was in the amount of \$39,660.15. The total deductions were in the amount of \$9,291.25. The net income was in the amount of \$30,368.90, and the total tax was in the amount of \$3,941.35. That plaintiff erroneously and illegally included within her gross income reported as aforesaid the sum of \$5,875.00, constituting the amount received by her during the calendar year 1939 as her share of the distribution made by the St. Clair Estate Company pursuant to said plan of complete liquidation hereinabove mentioned in paragraph VII. That no portion of said \$5,875.00 constituted income or gain taxable to plaintiff in that or any other year.

X.

That thereafter and within the time required by law, to wit, on March 3, 1943, the plaintiff filed with the Collector of Internal Revenue for the Sixth [28] Collection District of California a claim for refund on Treasury Department Form 843 demanding recovery of the sum of \$1,296.13, income tax erroneously and illegally overpaid for the calendar year 1930 by reason of plaintiff's having included in gross income for that year said sum of \$5,875.00. That thereafter, by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff, pursuant to section 3772(a)(2) of the Internal Revenue Code (Title 26, U. S. C., section 3772(a)(2)) that her claim for refund was disallowed.

XI.

That all conditions precedent to the proper institution of this action have been performed or have occurred.

XII.

Wherefore, plaintiff prays judgment in the sum of \$1,296.13, together with statutory interest thereon from the date of overpayment.

Count Two

I.

That plaintiff is an individual all times herein mentioned residing in the City of Los Angeles, State of California, and in the Southern District of California, Central Division.

II.

That the Internal Revenue (Income) Taxes in the amount of \$5,209.06 sought to be recovered herein were paid in quarterly installments in March 15, June 15, September 15 and December 15 in the year 1941 to Nat Rogan, an officer of the Government of the United States, the duly appointed and acting Collector of Internal Revenue for the Sixth Collection District of California. That Nat Rogan is not now and has not since June 30, 1943, been acting in the capacity of Collector of Internal Revenue for said Sixth Internal Revenue Collection District of California.

III.

That jurisdiction of this court over the matters herein related exists by virtue of United States Code, Title 28, Section 1346. [29]

IV.

That at all times herein mentioned plaintiff and her husband, L. P. St. Clair, were the equal co-owners of 300 shares of the common capital stock of the St. Clair Estate Company, a California corporation.

V.

That on or about December 23, 1938, said St. Clair Estate Company adopted a plan of complete liquidation and dissolution. Thereafter, and on January 10, 1939, pursuant to petition of one of the shareholders of said corporation, the Superior Court in and for Kern County, California, assumed jurisdiction over the affairs of said corporation to supervise

the winding up of said corporation, the distribution of its assets in final and complete liquidation, and the dissolution thereof according to said plan. That pursuant to said plan of complete liquidation and the applicable law of the State of California relating thereto, the officers of said corporation filed with the Secretary of State for California a certificate of election to wind up and dissolve said corporation.

VI.

That at all times herein mentioned said St. Clair Estate Company has remained under the jurisdiction of said Superior Court in and for Kern County, California, which court has continued to supervise the winding up and dissolution of said corporation under and pursuant to the laws of the State of California.

VII.

That during the calendar year 1940 the St. Clair Estate Company distributed to its shareholders, pursuant to said plan of complete liquidation adopted December 23, 1938, and in obedience to orders of said Superior Court in and for Kern County, the sum of \$26,000.00. That plaintiff, as shareholder, received as her share of said distribution the sum of \$3,250.00.

VIII.

That the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1940

on the ground that the distributions made by it during the year 1940 constituted distributions in liquidation which did not qualify it for a [30] dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (Docket No. 109162, 9 T. C. 392) that said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1940 by virtue of Section 27(g) Internal Revenue Code (26 U. S. C. Sec. 27(g)) entitled "Distributions in Liquidation." That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

That within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California her separate Federal income tax return for the year 1940 on Treasury Department Form 1040. That the gross income reported thereon was in the amount of \$36,884.59. The total deductions were in the amount of \$8,968.40. The net income was in the amount of \$27,916.19, and the total income and defense taxes in the amount of \$5,209.06. That plaintiff erroneously and illegally included within her gross income reported as aforesaid the sum of \$3,250.00, constituting the amount received by her during the

calendar year 1940 as her share of the distribution made by the St. Clair Estate Company pursuant to said plan of complete liquidation as set forth hereinabove in paragraph VII. That no portion of said \$3,250.44 constituted income or gain taxable to plaintiff.

X.

That thereafter and within the time required by law, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim for refund on Treasury Department Form 843, demanding recovery of the sum of \$1,138.49 income and defense tax erroneously and illegally overpaid for the calendar year 1940 by reason of plaintiff's having included in gross income for that year said sum of \$3,250.00. That thereafter, by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff, pursuant to Section 3722(a)(2) of the Internal Revenue Code (Title 26, U. S. C., Sec. 3772(a)(2)) that her claim for refund was disallowed. [31]

XI.

That all conditions precedent to the proper institution of this action have been performed or have occurred.

XII.

Wherefore, plaintiff prays judgment in the sum of \$1,138.49, together with statutory interest thereon from the date of overpayment.

Dated this 6th day of May, 1949.

/s/ THOMAS R. DEMPSEY,

/s/ WELLMAN P. THAYER,

/s/ ARTHUR H. DEIBERT,

/s/ WILLIAM L. KUMLER,

/s/ H. B. THOMPSON.

State of California,

County of Los Angeles—ss.

Annastatia St. Clair, being first duly sworn, deposes and says: That she is the plaintiff named in the foregoing complaint; that she has read the said complaint and knows the contents thereof and that the same is true of her own knowledge, except the matters which are therein stated to be upon information and belief, and that as to those matters she believes it to be true.

/s/ ANNASTATIA ST. CLAIR.

Subscribed and sworn to before me this 6th day of May, 1949.

[Seal] /s/ MELBA S. DEEMING,

Notary Public in and for
Said County and State.

[Endorsed]: Filed May 20, 1949. [32]

[Title of District Court and Cause.]

No. 9712-Y Civil

ANSWER

Comes now the defendant, above named, and in answer to plaintiff's complaint, admits, denies and alleges:

Count One

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof.

IV.

Admits the allegations contained in paragraph IV thereof.

V.

The allegations contained in paragraph V of the first count of the complaint are denied except it is admitted that on December 22, 1938, Cora St. Clair, beneficial owner of one-fourth of the stock of the St. Clair Estate Company, commenced an action for the dissolution of the St. Clair Estate Company [33] and for an accounting; that on December 23, 1938, the directors of the St. Clair Estate Company adopted resolutions providing for the winding up of the affairs of that company and its voluntary

dissolution; that on January 10, 1939, Cora St. Clair instituted an action in the Superior Court in and for Kern County, California, in which she asked for court supervision of the winding up of the affairs of the St. Clair Estate Company; and that that court entered an order that no distribution should be made of the asset or property of the St. Clair Estate Company, other than in the ordinary course of business, except by order of the court.

VI.

The allegations contained in paragraph VI of count one of the complaint are denied except it is admitted that at all times material herein the St. Clair Estate Company remained under the jurisdiction of the Superior Court in and for Kern County, California.

VII.

The allegations contained in paragraph VII of the first count of the complaint are denied except it is admitted that during the calendar year 1939, the St. Clair Estate Company distributed to its shareholders, in obedience to the orders of the Superior Court in and for Kern County, California, the sum of \$47,000.00, and that plaintiff, as shareholder, received as her portion thereof the sum of \$5,875.00.

VIII.

The allegations contained in paragraph VIII of the first count of the complaint are denied except it is admitted that the Commissioner of Internal Revenue thereafter issued a statutory notice of de-

iciency addressed to the St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1939 on the ground that the distributions made by it during the year 1939 constituted distributions in complete liquidation of said corporation which did not qualify it for a dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (*St. Clair Estate Company v. Commissioner*, Docket No. 109162, 9 T. C. 392) that [34] said corporation was entitled to a dividend paid credit for said distributions made in the calendar year 1939. That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

The allegations contained in paragraph IX of count one of the complaint are denied except it is admitted that within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California her separate federal income tax return for the year 1939 on Treasury Department form 1040. That the gross income reported thereon was in the amount of \$39,660.15. The total deductions were in the amount of \$9,291.25. The net income was in the amount of \$30,368.90, and the total tax was in the amount of \$3,941.35.

X.

The allegations contained in paragraph X of count one of the complaint are denied except it is admitted that on March 6, 1943, the plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim of refund of \$1,296.13 paid as income tax for the calendar year 1939; that by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff that her claim for refund was disallowed.

XI.

The allegations contained in paragraph XI of the first count of the complaint are denied.

Count Two

I.

Admits the allegations contained in paragraph I thereof.

II.

Admits the allegations contained in paragraph II thereof.

III.

Admits the allegations contained in paragraph III thereof. [35]

IV.

Admits the allegations contained in paragraph IV thereof.

V.

The allegations contained in paragraph V of count two of the complaint are denied except it is admitted that on December 22, 1938, Cora St. Clair,

beneficial owner of one-fourth of the stock of the St. Clair Estate Company, commenced an action for the dissolution of the St. Clair Estate Company and for an accounting; that on December 23, 1938, the directors of the St. Clair Estate Company adopted resolutions providing for the winding up of the affairs of that company and its voluntary dissolution; that on January 10, 1939, Cora St. Clair instituted an action in the Superior Court in and for Kern County, California, in which she asked for court supervision of the winding up of the affairs of the St. Clair Estate Company; and that that court entered an order that no distribution should be made of the assets or property of the St. Clair Estate Company, other than in the ordinary course of business, except by order of the court.

VI.

The allegations contained in paragraph VI of count two of the complaint are denied except it is admitted that at all times material herein the St. Clair Estate Company remained under the jurisdiction of the Superior Court in and for Kern County, California.

VII.

The allegations contained in paragraph VII of count two of the complaint are denied except it is admitted that during the calendar year 1940, the St. Clair Estate Company distributed to its shareholders in obedience to the orders of the Superior Court in and for Kern County, California, the sum of \$26,000.00 and that plaintiff, as shareholder, received as her portion thereof the sum of \$3,250.00.

VIII.

The allegations contained in paragraph VIII of the second count of the complaint are denied except it is admitted that the Commissioner of Internal Revenue thereafter issued a statutory notice of deficiency addressed to the [36] St. Clair Estate Company asserting a deficiency of personal holding company surtax against said corporation for the calendar year 1940 on the ground that the distributions made by it during the year 1940 constituted distributions in liquidation which did not qualify it for a dividend paid credit because entirely paid out of capital. That an appeal was taken from said notice of deficiency to the United States Tax Court which held (Docket No. 109162, 9 T. C. 392) that said corporation was entitled to a dividend paid credit of said distributions made in the calendar year 1940. That thereafter the Commissioner of Internal Revenue took an appeal to the Court of Appeals for the Ninth Circuit from the adverse decision of said Tax Court of the United States, but he thereafter dismissed said appeal on November 3, 1948.

IX.

The allegations contained in paragraph IX of the second count of the complaint are denied except it is admitted that within the time required by law plaintiff prepared and filed with the Collector of Internal Revenue for the Sixth Collection District of California her separate federal income tax return for the year 1940 on Treasury Department form

1040. That the gross income reported thereon was in the amount of \$36,884.59. The total deductions were in the amount of \$8,968.40. The net income was in the amount of \$27,916.19, and the total income and defense taxes in the amount of \$5,209.06.

X.

The allegations contained in paragraph X of the second count of the complaint are denied except it is admitted that on March 6, 1943, plaintiff filed with the Collector of Internal Revenue for the Sixth Collection District of California a claim for refund of the sum of \$1,138.49 paid as income and defense tax for the calendar year 1940, and that by registered letter dated December 23, 1948, the Commissioner of Internal Revenue advised plaintiff that her claim for refund was disallowed.

XI.

The allegations contained in paragraph XI of count two of the complaint are denied. [37]

Wherefore, having fully answered, defendant prays for judgment dismissing the complaint, together with costs and disbursements of this action.

JAMES M. CARTER,
United States Attorney,

E. H. MITCHELL, and

EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau
Of Internal Revenue.

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 21, 1949. [38]

In the United States District Court, Southern Dis-
trict of California, Central Division

No. 9712-Y

ANNASTATIA ST. CLAIR,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

Honorable Leon R. Yankwich, Judge.

MEMORANDUM DECISION

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Upon the grounds stated in the Memorandum Decision filed in Cause No. 9711-Y, Judgment will be for the defendant that plaintiff take nothing against the defendant. Costs to the defendant.

As all the facts are covered by stipulations, they may stand as the Court's Findings, and only Con-

clusions of law and Judgment need be prepared by counsel for the defendant, unless both counsel prefer to prepare formal findings.

Dated this 15th day of May, 1950.

/s/ LEON R. YANKWICH,
Judge.

[Endorsed]: Filed May 15, 1950. [40]

[Title of District Court and Cause.]

No. 9712-Y Civil

CONCLUSIONS OF LAW

The above entitled case came on regularly for trial on May 8, 1950, before the Court sitting without a jury; plaintiff appearing by her attorney, Dempsey, Thayer, Diebert and Kumler and H. Ben Thompson, Esquire, and the defendant appearing by Ernest A. Tolin, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said district; and evidence documentary and stipulations of facts having been received, and briefs having been filed by both parties; and oral argument having been made by both parties and the Court having fully considered the same from the facts the Court concludes:

I.

The question whether the payments made by the St. Clair Estate Company to the plaintiff during the

calendar years 1939 and 1940 were ordinary dividends or dividends in complete or partial liquidation is purely one of fact. [41]

II.

The payments made during the calendar years 1939 and 1940 by the St. Clair Estate Company to the plaintiff were dividends taxable at ordinary rates.

III.

The distributions to the plaintiff which the Superior Court of Kern County, California ordered during the years 1939 and 1940 were of current earnings only.

IV.

The corpus of the St. Clair Estate Company could not have been distributed and was not distributed until the judgment in the action brought by Cora St. Clair for an accounting of the assets of the St. Clair Estate Company became final on January 18, 1945.

V.

The plaintiff has not overcome the burden of showing that the Commissioner's determination that the payments made by the St. Clair Estate Company to plaintiff in 1939 and 1940 were dividends taxable at ordinary rates and not distributions either in partial or complete liquidation was erroneous.

VI.

The defendant is entitled to judgment that the plaintiff take nothing and for its costs.

/s/ LEON R. YANKWICH,

United States District Judge.

Approved as to form, as required by Rule 7(a).

Dated: July 28, 1950.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorneys for Plaintiff.

[Endorsed]: Filed July 28, 1950. [42]

In the United State District Court in and for the
Southern District of California, Southern
Division

No. 9712-Y Civil

ANNASTATIA ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

JUDGMENT

The above-entitled case came on regularly for trial on May 8, 1950, before the Court, sitting without a jury; plaintiff appearing by her attorney, Dempsey, Thayer, Deibert and Kumler and H. Ben Thompson, Esquire, and the defendant appearing by Ernest A. Tolin, United States Attorney for the Southern District of California, and Edward R. McHale, Assistant United States Attorney for said district. Evidence documentary was received and the cause was thereupon submitted to the Court upon two

stipulations of facts signed by attorneys for the parties hereto. Briefs were filed on behalf of the parties hereto. Thereafter, the Court, having fully considered the facts and the briefs and being fully advised in the premises, ordered preparation of the Conclusions of Law and Judgment.

Wherefore, by reason of law and the evidence and the stipulations of facts and Conclusions of Law of the Court which have been filed and the premises aforesaid, [43]

It Is Ordered, Adjudged and Decreed and this does order, adjudge and decree that the plaintiff take nothing, and that the defendant have and recover of and from the plaintiff its costs in this behalf expended, hereby taxed in the sum of \$20.00.

Dated this 28th day of July, 1950.

/s/ LEON R. YANKWICH,
United States District Judge.

Approved as to form, as required by Rule 7(A).
Dated: July 28, 1950.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorneys for Plaintiff.

Judgment entered July 31, 1950.

[Endorsed]: Filed July 28, 1950. [44]

PLAINTIFF'S EXHIBIT NO. 1

In the United States District Court for the Southern
District of California, Central Division

No. 9711-Y Civil

L. P. ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 9712-Y Civil

ANNASTATIA ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel without prejudice to the rights of any party herein to introduce additional evidence not inconsistent herewith and without prejudice to their right to object to the materiality or relevancy of any of the facts agreed to as follows:

(1) The St. Clair Estate Company was organized in 1903 by the St. Clair family consisting of father, mother, three sons and one daughter. The father and mother died before the end of 1904 and thereafter all of the stock of said corporation con-

sisting of 1200 shares was divided among the three sons, [46] L. P. St. Clair, E. S. St. Clair, F. C. St. Clair and the daughter, Cora St. Clair, each receiving 300 shares by bequest or inheritance from their parents' estates. The three brothers became directors. About 1910 differences arose between Cora and her brothers, and she employed an attorney to examine the manner in which they were conducting the business. In 1913 she married a man named Cooper, and shortly thereafter dissension again arose between her and her brothers which continued with slight interruption. In 1914 she engaged another lawyer in connection with her differences with her brothers, and in February, 1915, an agreement was entered into for the settlement of all existing differences. Shortly thereafter Cora pledged 240 of her 300 shares in the St. Clair Estate Company to a bank as security for a loan, which she did not pay. At the pledgee's sale the stock was bought by E. S. St. Clair. Cora's remaining 60 shares in the St. Clair Estate Company were sold at an execution sale in 1917 to Henry Biggs and subsequently were acquired by E. S. St. Clair. Although Cora had lost her stock in the St. Clair Estate Company in the foregoing manner, the brothers continued to give her at least \$150.00 a month and larger amounts at intervals so that between 1917 and 1928 she received from them more than \$65,000.00. In addition, the brothers had caused the St. Clair Estate Company to construct a house for her at a cost of about \$15,000.00.

(2) In 1928 Cora employed an attorney who filed

a proceeding seeking an adjudication that one-fourth of the stock of the St. Clair Estate Company was held under an implied trust in her favor and for her benefit. It was also claimed that the brothers were guilty of fraud and mismanagement in their conduct of the St. Clair Estate Company's affairs. Prior to the trial of the proceeding, the St. Clair Estate Company, the three brothers and Cora, on January 31, 1929, entered into a settlement agreement. The agreement provided for the transfer in trust of 300 of the 600 shares of the St. Clair Estate Company's stock held by E. S. St. Clair to a Los Angeles bank as trustee for Cora and her son, Leonard St. Clair Cooper, with Cora to receive the income from the trust during her lifetime. It was agreed by the three brothers in their capacities as stockholders and in whatever official capacities they might thereafter occupy in the St. Clair Estate Company and by the Company in so far as it had the legal [47] right to do so that from January 31, 1929, the surplus profits of the St. Clair Estate Company thereafter accumulated should be determined annually as nearly as practicable on February 1 and dividends declared distributing such surplus to the stockholders. It was further agreed that the portion of such dividends payable to the trustee should be divided into twelve equal amounts and that one of them should be paid to the trustee on the first day of each month until the next declaration of dividends, with such procedure to be repeated and continued indefinitely. On February 2, 1929, the parties executed a supplement to the foregoing agreement,

providing that the first \$6,000.00 of dividends annually paid on the stock held by the trustee should be held by the St. Clair Estate Company for payment in monthly installments to the trustee and that the amounts in excess of \$6,000.00 should be paid over immediately to the trustee, to be held and disposed of by it at the direction of Cora.

(3) On December 1, 1932, plaintiffs herein entered into a property agreement, copy of which is attached hereto, marked Exhibit "A" and by reference made a part hereof.

(4) Prior to 1938 it was the practice of the St. Clair Estate Company's directors to have informal meetings, for some of which no records were made. From 1930 through 1935 the directors made no formal declarations of dividends and no entry thereof was made on the minute book of the St. Clair Estate Company. However, during each of the years following the execution of the above-mentioned settlement agreement, the St. Clair Estate Company, with few exceptions, paid to the trustee \$500.00 per month, which was designated by it as dividends and was reported as such by the trustee on its fiduciary returns of income. Throughout the years 1929 through 1940 the three St. Clair brothers had accounts on the books of the company designated "Dividend Accounts" to which were credited from time to time amounts payable to them and which were debited with payments made to them from time to time upon their demand.

(5) On December 22, 1938, Cora St. Clair filed

an action (Action No. 33053) in the Superior Court of the State of California in and for the County of Kern against the St. Clair Estate Company and her three brothers. In it she asserted many claims against the brothers on behalf of the St. Clair Estate [48] Company, alleged that the brothers had been guilty of many acts of misconduct, mismanagement and fraud, and asked for a dissolution of the St. Clair Estate Company and for an accounting in respect to its affairs. She did not question the validity of the dividends shown on the St. Clair Estate Company's books as payable to the brothers, but contended that they owed the St. Clair Estate Company sums in excess thereof, and upon that basis she asked that the St. Clair Estate Company be restrained from paying any moneys to the brothers as dividends or otherwise pending trial of the action. On the same day the Court issued an Order, copy of which is attached hereto, marked Exhibit "B," and by reference made a part hereof.

(6) On December 23, 1938, the directors of the St. Clair Estate Company held a meeting at which they adopted, among others, resolutions declaring that all sums paid the trustee from January 31, 1929, through December 31, 1937, were and constituted dividends for the year in which paid, and further declaring that the St. Clair Estate Company's action in crediting and paying to the three brothers equalizing dividends so that the total dividends paid to each stockholder for the period January 31, 1929, through December 31, 1937, would aggregate \$56,000.00 was ratified and confirmed. They also

adopted a resolution authorizing a distribution of \$20.00 per share, or a total of \$24,000.00 payable forthwith. A copy of the minutes of said meeting are appended hereto, marked Exhibit "C" and by reference made a part hereof. A copy of minutes of a stockholders' meeting held the same day is appended hereto, marked Exhibit "W" and by reference made a part hereof.

(7) Before the meeting of the directors held on December 23, 1938, had adjourned, a copy of the Court Order entered on the preceding day was served, and the brothers, immediately following adjournment and on December 23, 1938, obtained a modification of the Order so as to remove the restraint against the declaration of dividends. A copy of said Modification Order is appended hereto, marked Exhibit "D" and by reference made a part hereof. However, the restraint on payment continued in full force and effect. The distribution of \$24,000.00 was recorded on the St. Clair Estate Company's books in December, 1938, by entries debiting dividends declared with that amount and crediting the dividend account of the trustee and each of the three brothers with the amount of \$6,000.00 with the explanation "To record dividends for the year 1938." [49]

(8) On December 28 and 30, 1938, hearing was had in the Superior Court of Kern County on the Order directing the company to show cause why the Temporary Restraining Order should not be made permanent, and as a result the Court ordered

that the Temporary Restraining Order theretofore issued continue in effect pending trial of the action.

(9) On January 10, 1939, Cora, her son and the trustee, as shareholders of the St. Clair Estate Company, filed in the Superior Court of California in and for the County of Kern a Shareholders' Petition (Action No. 33107) for Court supervision of the winding up of the affairs of the St. Clair Estate Company, as provided for under the California Civil Code. After hearing was had on the Petition, an Order was filed on April 20, 1939, providing that the St. Clair Estate Company's affairs be wound up under the supervision of the Court and that no distribution should be made of the St. Clair Estate Company's assets or property except by Order of the Court.

(10) On April 28, 1939, the Court, pursuant to the stipulation of the parties, ordered that the St. Clair Estate Company pay the sum of \$24,000.00 to its stockholders, \$6,000.00 to the trustee and \$6,000.00 to each of the three brothers. A copy of the Superior Court's minutes at the hearing held April 28, 1939, is attached hereto, marked Exhibit "E," and by reference made a part hereof. Thereafter, on October 13, 1939, it entered its Order in Action No. 33107 construing its Order of April 28, 1939. A copy of said Order is appended hereto, marked Exhibit "F," and by reference made a part hereof.

(11) On May 8, 1939, each of the brothers were paid \$6,000.00 by the St. Clair Estate Company. Their dividend accounts on the St. Clair Estate

Company's books were debited with the amounts paid them, and on the stubs of the checks issued for the payment were entered the statement "Account dividend declared December 23, 1938." Each of the brothers, in his 1938 return, reported as dividends and income received in 1938, the amount of \$6,000.00 representing his part of the dividend declared by the directors on December 23, 1938, and paid the income tax thereon. Subsequently, the Treasury Department refunded to the brothers the tax paid on the \$6,000.00 dividends that each reported in his 1938 return. [50]

(12) By resolutions of the Board of Directors of the St. Clair Estate Company adopted at the meeting held December 27, 1939, copy of the minutes of which is attached hereto, marked Exhibit "G," and by reference made a part hereof, the Board authorized the distribution of \$23,000.00 to the shareholders payable forthwith. Pursuant to the stipulation of the parties in Action No. 33053 that the Restraining Order might be so modified, the Court, on December 27, 1939, entered its Order authorizing and directing the payment by the St. Clair Estate Company to its stockholders in 1939 "amounts up to the net earnings of said corporation for the year 1939." Thereafter on the same day a stipulation of the parties was filed in Action No. 33107 authorizing the distribution to the shareholders of \$23,000.00. Later the same day checks for \$5,750.00 were delivered to each of the four shareholders of the St. Clair Estate Company. In their 1939 income tax returns, plaintiffs included in income as dividends received in

1939 the sum of \$11,750.00 distributed to them as hereinabove set forth during the calendar year 1939 consisting of the \$6,000.00 authorized by the resolutions of December 23, 1938, and the \$5,750.00 authorized by the resolutions of December 27, 1939. The stockholders of the St. Clair Estate Company did not surrender any of their certificates of stock in said corporation during 1939, and the corporation did not during that year cancel any certificates or shares of its stock. Copies of plaintiffs' Federal income tax returns for the year 1939 are attached hereto, marked Exhibits "H" and "I," respectively, and by reference made a part hereto. A copy of the Stipulation authorizing the distribution ordered by the Court on December 27, 1939, is attached hereto, marked Exhibit "J," and by reference made a part hereof.

(13) Pursuant to stipulation of the parties, the Superior Court, in Action No. 33107, during 1940 entered four Orders directing payment by the St. Clair Estate Company in that year of amounts totalling \$26,000.00. An Order entered June 4, 1940, directed the payment of \$6.66 per share "out of the earnings of 1940." An Order entered October 3, 1940, directed the payment of \$4,000.00 "out of the St. Clair Estate Company income on hand." An Order entered December 11, 1940, directed the payment of \$8.33 per share "out of the earnings of the above corporation for the year 1940 solely." An Order entered December 26, [51] 1940, directed the payment of a dividend of \$3.33⅓ per share "solely out of and from income that has accrued to the said

corporation for the calendar year 1940 and that is now available for said purpose." The four distributions authorized as aforesaid during the year 1940 were paid by the corporation, each of the shareholders receiving as his share \$6,500.00. In their 1940 Federal income tax returns, plaintiffs included in income and reported as dividends the amount so received. The stockholders of the St. Clair Estate Company did not surrender any of their certificates of stock in said corporation during 1940, and the corporation did not, during that year, cancel any certificates or shares of its stock. Copies of plaintiffs' Federal income tax returns for said year are appended hereto, marked Exhibits "K" and "L," respectively, and by reference made a part hereof. Copies of the minutes of the meetings of the Board of Directors held in 1940 authorizing the distributions set forth above are attached hereto, marked Exhibits "M," "N," and "O," respectively, and by reference made a part hereof. Copies of the Orders of the Court authorizing the distributions made during said year are attached hereto, marked Exhibits "P," "Q," "R," and "S," respectively, and by reference made a part hereof.

(14) Thereafter proceedings involved in Actions Nos. 33053 and 33107 proceeded simultaneously. The former, involving a demand for an accounting, proceeded to judgment adverse to the plaintiff, and an appeal therefrom was taken to the District Court of Appeal. The trial court's decision was affirmed. *In Re St. Clair Estate Company*, 66 Cal. App. (2d)

964; 153 Pac. (2d) 453, on November 22, 1944. A rehearing in said Court was denied on December 19, 1944, and the Supreme Court of the State denied a hearing on January 18, 1945. Thus terminated Action No. 33053.

(15) Action No. 33107, involving Court supervision of the winding up and dissolution of the St. Clair Estate Company, continued as indicated by the copy of the Registrar of Actions of the Superior Court of Kern County pertaining thereto which is attached hereto, marked Exhibit "T," and by reference made a part hereof.

(16) The St. Clair Estate Company claimed a dividend paid credit for the year 1939 of \$47,000.00 and for the year 1940 a dividend paid credit of \$26,000.00. Said corporation's net income for the year 1939 was \$21,417.48 and for the year [52] 1940 was \$19,107.58. Its earned surplus at the close of each of said years was in excess of \$150,000.00. The Bureau of Internal Revenue proposed a deficiency of personal holding company surtax against the St. Clair Estate Company for the years 1937 to 1940, inclusive. A statutory notice of deficiency was issued August 16, 1941, and an appeal therefrom was taken to the United States Tax Court where the liability of said corporation for said taxes was litigated. The report of said case appears in St. Clair Estate Company v. Commissioner of Internal Revenue, 9 T.C. 392. The Government was successful in establishing deficiencies of surtax for the calendar years 1937 and 1938, whereas the St. Clair

Estate Company was successful in establishing its nonliability for the years 1939 and 1940. The litigation in the Tax Court continued until promulgation of said Court's decision on September 24, 1937. Thereafter both sides filed Petitions for Review with the Court of Appeals for the Ninth Circuit. On November 3, 1948, the St. Clair Estate Company on the one hand and the Commissioner of Internal Revenue on the other hand, by stipulation, dismissed their appeals to the Court of Appeals for the Ninth Circuit.

(17) Thereafter the St. Clair Estate Company filed with the Commissioner of Internal Revenue Notice of Intention to Claim a Deficiency Dividend Credit Under Section 506 of the Internal Revenue Code for the year 1937, and on June 22, 1948, made a distribution to its stockholders as provided in section 506(c) of the Internal Revenue Code. Thereafter it filed its claim for said credit on Treasury Department Form 976, which claim was allowed in full by the Commissioner of Internal Revenue.

(18) On February 18, 1949, and within the time permitted by law, the St. Clair Estate Company filed with the Commissioner of Internal Revenue in Washington, D. C., on Treasury Department Form 975 its Notice of Intention to Claim a Deficiency Dividend Credit Under Section 506 of the Internal Revenue Code for the year 1938. Prior thereto, however, the St. Clair Estate Company, on October 28, 1948, paid the 1938 deficiency found by the

United States Tax Court to be \$8,318.77. Thereafter the corporation filed in the Superior Court of the State of California in and for Kern County in Action No. 33107 a Petition for Order Distributing Assets of Corporation in Final Liquidation, among other things [53] praying therein that the corporation be permitted to so distribute its assets that the time and distribution thereof would permit the corporation to obtain a deficiency dividend credit which would operate to expunge the 1938 deficiency. Accordingly, on December 30, 1948, said Court entered an Order conforming with the prayer in the Petition. Copy of said Order is attached hereto, marked Exhibit "U," and by reference made a part hereof.

(19) Thereafter distribution of the remaining assets of the St. Clair Estate Company was made according to the schedule, copy of which is attached hereto, marked Exhibit "V," and by reference made a part hereof.

(20) Pursuant to claim filed by said corporation on Treasury Department Form 976 for the personal holding company surtax paid by it for the calendar year 1938, the Treasury Department, on October 29, 1949, refunded to said corporation the surtax paid for the year 1938.

(21) On December 30, 1949, the St. Clair Estate Company filed with the Superior Court in and for Kern County in Action No. 33107 its Petition for Order of Final Dissolution. Hearing thereon was duly had on January 12, 1950, and on that date said

Court entered an Order declaring the St. Clair Estate Company dissolved.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorney for Plaintiff.

EARNEST TOLIN,
United States Attorney,

E. H. MITCHELL,
Assistant United States
Attorney,

EDWARD R. McHALE,
Assistant United States
Attorney,

EUGENE HARPOLE,
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ JAMES D. PETTUS,
Attorneys for United States
of America, Defendant. [54]

Exhibit B

In the Superior Court of the State of California,
in and for the County of Kern

No. 33053

CORA M. ST. CLAIR,

Plaintiff,

vs.

ST. CLAIR ESTATE COMPANY, a Corporation,
et al.,

Defendants.

ORDER TO SHOW CAUSE AND TEMPORARY
RESTRAINING ORDER

On reading and filing the verified complaint of plaintiff in this suit and the affidavit of Warren E. Libby, one of the attorneys for plaintiff, it appears to the satisfaction of the Court therefrom that this is a proper case for a temporary restraining order and that, unless the temporary restraining order prayed for in said complaint be granted, great and irreparable injury will result to the plaintiff before the matter can be heard on notice, and good cause appearing therefor:

It Is Therefore Ordered that the said defendants St. Clair Estate Company, a corporation, L. P. St. Clair, E. S. St. Clair, F. C. St Clair, Bakersfield Laundry Association, a corporation, Henry Biggs, Anastasia St. Clair, Marie Costello St. Clair, and each of them appear before this Court in its Courtroom, in Department Two thereof, in the Court

house, in the City of Bakersfield, County of Kern, State of California, at the hour of Two o'clock, P. M., on the 27th day of December, 1938, then and there to show cause, if any they have, why they and each of them should not be restrained and enjoined during the pendency of this suit from removing, altering, disposing of, or destroying any of the books of account, records, papers, assets and property, of the St. Clair Estate Company, a corporation, Bakersfield Laundry Association, a corporation, St. Clair Oil Company, a co-partnership, Coalinga Central Oil Company, a [1078] corporation' Calloma Oil Company, a corporation, Calloma Extension Oil Company, a co-partnership, St. Clair and Jastro, a co-partnership, Calex Oil Company, a corporation, Tejon Oil Company, a corporation, and Wildecat Mining Company, a fictitious name; and also why they, and each of them, should not be restrained from declaring or paying any dividends on the part of the St. Clair Estate Company, a corporation, to cancel the fictitious account upon its books against the plaintiff for the sum of \$20,000.00 labelled "prepayments of dividends" and from equalizing dividends and paying to said defendants, L. P. St. Clair, E. S. St. Clair and F. C. St. Clair the sum of \$20,000.00 each from the assets of said St. Clair Estate Company as dividends, and from paying to them, or either of them, any dividends claimed to be owing and unpaid to them from the St. Clair Estate Company until an accounting is had herein;

It Is Further Ordered that pending the hearing

of this Order to Show Cause, You, and each of you, are hereby restrained and enjoined

(1) From altering, removing, disposing of, and destroying any of the books, records, books of account, property or assets of the St. Clair Estate Company, a corporation, Bakersfield Laundry Association, a corporation, St. Clair Oil Company, a co-partnership, Coalinga Central Oil Company, a corporation, Calloma Oil Company, a corporation, Calloma Extension Oil Company, a co-partnership, St. Clair and Jastro, a co-partnership, Calnex Oil Company, a corporation, Tejon Oil Company, a corporation, and Wildeat Mining Company, a fictitious name, or any part of said records or property, excepting in the general and ordinary course of business of said St. Clair Estate Company and Bakersfield Laundry Association;

(2) From “declaring or”¹ paying any dividends on the part of the St. Clair Estate Company, a corporation, to cancel the [1079] fictitious account upon its books against the plaintiff for the sum of \$20,000.00 labelled “prepayments of dividends” and from “equalizing dividends and”² paying to said defendants, L. P. St. Clair, E. S. St. Clair and F. C. St. Clair the sum of \$20,000.00 each from assets of said St. Clair Estate Company as dividends, and from paying to them, or either of them, any dividends claimed to be owing and unpaid to them from

¹M B 124 Page 23 Strike.

²M B 124 Page 23 Strike.

the St. Clair Estate Company until an accounting is had herein;

It Is Further Ordered that a copy of this order, together with a copy of the complaint and affidavit in this action, be served on each of the defendants herein at least 3 days before the time set for the hearing herein.

[Seal] /s/ W. L. BRADSHAW,
Judge of the Superior Court.

Memorandum of Authorities:

Sec. 526, C.C.P.;

6A Cal. Jur. (Corporations) Sec. 457;

Wright vs. Orville Mining Co., 40 Cal. 20

[Endorsed]: Filed Dec. 23, 1938, Superior Court.

Exhibit C

Minutes of Meeting of Board of Directors of
St. Clair Estate Company

Held: December 23, 1938

Pursuant to call by the President, and written notice given to all directors as required by law, and by the By-Laws of the Company, a meeting of the Board of Directors of St. Clair Estate Company was held at the office of the corporation, 1517 20th Street, in the City of Bakersfield, California, on Friday, December 23, 1938, at 10 o'clock A. M.

There were present Directors:

/s/ E. S. ST. CLAIR

/s/ F. C. ST. CLAIR

/s/ L. P. ST. CLAIR

/s/ HENRY BIGGS

Absent:

/s/ CORA ST. CLAIR COOPER

President, E. S. St. Clair presided and the following business was transacted:

The President reported that an examination of the books and records of St. Clair Estate Company had been made by Haskins & Sells, Certified Public Accountants, and he thereupon presented to the Directors financial statements and reports prepared by said Accountants, covering in particular the period from February 1, 1929, to and including December 6, 1938, and certain matters of interest [73] prior thereto, for examination and consideration. A discussion of said matters then followed.

Whereupon, on motion of Director L. P. St. Clair seconded by Director Henry Biggs, the following resolution was unanimously adopted:

“Whereas, the corporation has caused an examination of the books and records of St. Clair Estate Company to be made by Haskin & Sells, Certified Public Accountants; and

“Whereas, reports of the results of such examination and financial statements prepared by said auditors covering in particular the period from January 31, 1929, up to and including December 6, 1938, and including among other matters:

(a) Balance sheets as of January 31, 1929; as of December 31, 1937; and as of December 6, 1938, with appropriate comparisons.

(b) Statement of income for the period from and after January 31, 1929, to and including De-

ember 31, 1937, and also thereafter up to and including December 6, 1938, by periods (showing revenues and expenses) and giving in detail the revenues received and the expenditures made (exclusive of profits and losses arising from disposal of capital assets), year by year. [74]

(c) Statement of investment securities owned by the Company as of December 31, 1937, and also as of December 6, 1938, and showing the book value and the market value thereof, respectively, on the latter date.

(d) Statement of unimproved lands as of December 6, 1938; also itemized statements of other assets which are of such character as to be impractical to show on the balance sheet, up to December 6, 1938.

(e) Statement of earned surplus as of February 1, 1929, and also for the period from January 31, 1929, to and including December 31, 1937, and also for the period from December 31, 1937, to and including December 6, 1938.

(f) Statement of dividend payment from January 31, 1929, to and including December 6, 1938.

(g) Statement of paid in surplus as shown by the books on December 6, 1938.

(h) Statements of assets received by the corporation as consideration for issuance of capital stock as of March 7, 1903.

(i) Estimated realizable value of assets of the company as of December 6, 1938.

(j) Estimated value of assets of the company as of March 1, 1913.

(k) Statement of assets recorded on books [75] on opening entry under date of February 25, 1915, and other matters as appear from said statements.

“And, Whereas, the directors having examined and fully considered said reports and financial statements, and being fully advised in the premises, are satisfied with the conduct of the affairs of the company as shown by said report and financial statements; and

“Whereas, the President has reported that except for minor current accounts payable, not exceeding the sum of \$500.00 and the action pending in the Superior Court of the State of California, (Los Angeles County No. 425-810) in which Cora St. Clair is plaintiff and St. Clair Estate Company, et al., defendants, in which action the sum of \$4500.00 is in issue, the corporation has no known debts or liabilities;

“Now, Therefore, Be It Resolved that said report and financial statements be and the same are hereby received and approved.

“Resolved, Further, that all sums of money paid to Security-First National Bank of Los Angeles, as trustee for Cora St. Clair (Cooper) from January 31, 1929, to and including December 31, 1937, aggregating \$56,500.00 were and do constitute dividends of St. Clair Estate Company in the year in which said sums respectively were paid. [76]

“Resolved, Further, that the crediting and payment in the year 1938 to stockholders F. C. St. Clair, E. S. St. Clair and L. P. St. Clair, of equalizing dividends payable forthwith, aggregating \$45,000.00, so that the total dividends paid to said

stockholders for the period January 31, 1929, to and including December 31, 1937, aggregating \$56,000.00 to each stockholder, is hereby ratified, confirmed and declared to be the act and deed of the Board of Directors of said St. Clair Estate Company and of said Company.

“Resolved, Further, that a dividend payable forthwith of \$20.00 per share on the outstanding stock of the Company and aggregating \$24,000.00, be and the same is hereby declared out of the earned surplus and surplus profits of the corporation, payable in the year 1938, as follows: To said Security-First National Bank of Los Angeles, Trustee for Cora St. Clair Cooper \$6,000.00 (heretofore paid), F. C. St. Clair \$6,000.00, E. S. St. Clair \$6,000.00, and L. P. St. Clair \$6,000.00.

“Resolved, Further, that the declaration or making of, and the payment and/or crediting to stockholders of the respective dividends during the period from January 1, 1929, to and including December 6, 1938, as shown by said reports and/or said financial statements be, and each and every thereof is, hereby approved, ratified and confirmed, and declared to be the act and [77] deed of the Board of Directors of St. Clair Estate Company, and of said Company.

“Resolved, Further, that each and all of the acts and transactions, as set forth or referred to in said reports and financial statements be and the same are hereby approved, ratified and confirmed.

“Resolved, Further, that all of the acts of the officers of the company in making expenditures and disbursements, receiving and handling of revenues,

purchase or other acquisition of assets in addition to those originally received by the company, and the disposal of assets of the company as set forth and/or referred to in said report or financial statement be, and the same are, hereby all and singular approved, ratified and confirmed.”

“Resolved, Further, that the President or Vice-President and Secretary of the Company be, and said officers are, hereby authorized and fully empowered, in their discretion, to offer for sale and to sell at public or private sale any securities (consisting of shares of corporate stock or bonds, or both) owned by St. Clair Estate Company, at the market price therefor, at any time between and including December 23, 1938, and December 30th, 1938, and to use the proceeds thereof in payment and discharge of any and all dividends declared and/or ratified or dividend payments authorized to [78] be paid by resolution adopted at this meeting of directors.

“Resolved, Further, that as to and respecting any such securities which are listed and traded in upon a stock exchange, the sale of any such securities upon the New York Stock Exchange, or other Exchange upon which the same is listed, at the market on such Exchange on the day and at the time of day at which the sale is made, shall conclusively establish and constitute the market price for such security.

“Resolved, Further, that the President or Vice-President, and the Secretary of this corporation be, and said officers are, hereby fully authorized and empowered, in their discretion, to satisfy all or any

portion of each and every dividend which has been declared and authorized to be paid, by resolution adopted at this meeting of the Board of Directors, or the making of which and/or the payment of which has been authorized or ratified by resolution adopted at this meeting of the Board of Directors, by transfer and delivery to any stockholder entitled to receive dividend payment and who is willing to accept the same, of securities (consisting of shares of corporate stock or corporate bonds, or both) owned by St. Clair Estate Company, at the market price thereof on the date of such transfer and delivery, which shall take place at any time between and [79] including December 23, 1938, and December 30, 1938.

“Resolved, Further that, as to any such securities which are listed and traded in upon any established stock exchange—the closing price on the said date of sale on the New York Stock Exchange, or other Exchange upon which such securities are listed, which securities are transferred and delivered to a stockholder in satisfaction in whole or in part of dividend payment hereunder, shall constitute the market price of such security on the date of such delivery, within the period hereinabove prescribed therefor.

“Resolved, Further, that in case the company transfers and delivers to any stockholder any security or securities owned by the company in satisfaction in whole or in part of dividend payment to such stockholder—as authorized by the last preceding resolution of this Board of Directors—the Presi-

dent or Vice-President and Secretary are further authorized instructed to tender and offer to each other stockholder of the company, the opportunity to take a proportionate amount of the same security or securities in satisfaction, in whole or in part, of any dividend payment or payments payable to such stockholder, pursuant to resolutions adopted at this meeting of the Board of Directors, or in case payment has previously been made to any such stockholder, of similar dividends in cash, then there be offered to [80] such stockholder the opportunity to purchase for cash a proportionate amount of such securities at the same price as the same shall be taken by any stockholder in satisfaction in whole or in part of dividend payment payable to such stockholder."

Upon motion duly made and carried, the meeting was adjourned.

/s/ F. C. ST. CLAIR,

Secretary of St. Clair Estate
Company.

/s/ E. S. ST. CLAIR,

President of St. Clair Estate
Company. [81]

St. Clair Estate Company
(Incorporated in California)

Balance Sheet, December 6, 1938

Assets

Cash	\$	8,199.06
Dividends Receivable (payable in December, 1938)		380.53
Notes Receivable:		
Cora M. Cooper	\$	2,750.00
Sunset Oil Company		1,562.50
M. H. Warren		345.39
		<hr/>
Total notes receivable		4,657.89
Investment Securities		433,497.84
Property:		
Unimproved lands	\$	21,773.06
Hollywood residence property		
(net depreciated value)		7,388.80
Mining claims		250.00
		<hr/>
Total Property		29,411.86
		<hr/>
Total.....		<u>\$476,147.18</u>

Liabilities

Accrued Taxes:		
Federal income tax	\$	358.35
Federal capital stock tax		115.00
California State franchise tax.....		25.00
		<hr/>
	\$	498.35
Stockholders' Accounts:		
L. P. St. Clair.....	\$	36,633.20
F. C. St. Clair.....		35,900.00
E. S. St. Clair.....		21,160.10
		<hr/>
Total stockholders' accounts		93,693.30
Stated Capital and Surplus:		
Stated capital (authorized and outstanding,		
1,200 shares of \$20.00 each)	\$	24,000.00
Paid-in surplus		105,487.00
Earned surplus		252,468.53
		<hr/>
Total stated capital and surplus.....		381,955.53
		<hr/>
Total.....		<u>\$476,147.18</u>

St. Clair Estate Company

Statement of Income

For the Period From January 1, 1938, to December 6, 1938

Revenues:

Dividends on stocks	\$32,440.36	
Royalty on Nincovich Lease.....	1,344.44	
Miscellaneous	160.94	\$33,945.74

Expenses:

Management compensation (E. S. St. Clair)..	\$ 2,400.00
Legal and accounting fees.....	3,170.00
County property taxes.....	704.75
Federal income and capital stock taxes.....	1,904.78
California franchise tax.....	343.35
Interest	568.48
Subscriptions to financial services.....	147.85
Depreciation of Hollywood building.....	168.82
Contributions	150.00
Miscellaneous	88.90

Total expenses 9,646.93

Net Income.....\$24,298.81

St. Clair Estate Company
Investment Securities
December 6, 1938

December 6, 1958

			Estimated Market Value	
	Shares	Book Value	Per Share	Amount
Marketable securities:				
Union Oil Company of Calif.....	9633	\$191,992.21	\$ 18.75	\$180,618.75
Transamerica Corp.	2096	48,910.64	7.00	14,672.00
Shell Union Oil Co.....	2077	28,745.81	14.13	29,337.63
Honolulu Oil Corp.....	1000	39,906.26	20.50	20,500.00
Allis-Chalmers Manufact'ng Co. 150		7,622.50	46.00	6,900.00
Standard Oil Co. of Indiana.....	100	4,907.50	26.75	2,675.00
U. S. Pipe & Foundry.....	100	3,295.00	44.50	4,450.00
Southern Calif. Gas Co. 6% pfd. 356		7,453.75	30.00	10,680.00
Bank of America N.T. & S.A.....	419	23,045.00	37.00	15,503.00
Bancamerica-Blair Corp.	83	996.00	3.25	269.75
West Coast Life Insurance Co... 52		596.00	7.50	390.00
Total.....		\$357,470.67		\$285,996.13
Other securities:				
Bakersfield Laundry Assn.....	200	\$ 20,000.00	\$200.00	\$ 40,000.00
Calex Oil Company.....	12000	33,799.38	.60	7,200.00
San Joaquin Compress & Warehouse Co.	25	1,700.00	200.00	5,000.00
Bakersfield Investment Co.....	100	7,914.69	85.00	8,500.00
Padre Hotel Corp.....	20	2,000.00	100.00	2,000.00
S. W. & B. Oil Co.....	53631	5,363.10	.10	5,363.10
Bakersfield Sandstone Brick Co. 93.46		3,750.00	100.00	9,346.00
Sun-maid Raisin Growers Ass'n pfd.	5	500.00		nil
Bakersfield Elks Hall Assn.	1025	1,000.00		nil
Total.....		\$ 76,027.17		\$ 77,409.10
Total.....		\$433,497.84		\$363,405.23

Note: Marketable securities have been valued at the last bid or sale prices on December 6, 1938. The other securities are stated at values as estimated by Mr. E. S. St. Clair.

St. Clair Estate Company
Property
December 6, 1938

	Book Value	Estimated Realizable Value
Unimproved Lands:		
Kern County, California:		
480 acres in Section 20-28-24 (NW $\frac{1}{4}$ and S $\frac{1}{2}$)	\$ 4,800.00	\$ 4,800.00
80 acres in Section 18-11-19 (E $\frac{1}{2}$ of SE $\frac{1}{4}$) (1)	800.00	2,000.00
$\frac{1}{8}$ interest in 70 acres in Section 6-11-23 (NW $\frac{1}{4}$ of SE $\frac{1}{4}$, S $\frac{1}{2}$ of NE $\frac{1}{4}$ of SE $\frac{1}{4}$, 5 acres in SE $\frac{1}{4}$ of SE $\frac{1}{4}$, and 5 acres in SE $\frac{1}{4}$ of NE $\frac{1}{4}$) (2)	899.22	12,000.00
100 acres in Sections 1 and 2-29-21 (W $\frac{1}{2}$ of E $\frac{1}{2}$ of W $\frac{1}{2}$ of NW $\frac{1}{4}$ and W $\frac{1}{2}$ of W $\frac{1}{2}$ of NW $\frac{1}{4}$ of Section 1 and E $\frac{1}{2}$ of E $\frac{1}{2}$ of NE $\frac{1}{4}$ of Section 2)	10,000.00	10,000.00
100 acres in Section 28-30-27 (Westerly 100 acres of SW $\frac{1}{4}$) (3)	3,060.26	3,000.00
Los Angeles County, California:		
$\frac{1}{4}$ interest in Gardena lot (S 209.17 feet of Lot 5 of South Gardena Tract)	2,213.58	2,000.00
Total unimproved lands	\$21,773.06	\$33,800.00
Hollywood Residence Property (1712 Sierra Bonita Ave., Los Angeles, California)	7,388.80	12,000.00
Mining Claims:		
Wilkinson Placer Claim, Nevada County, Calif. (10/24ths interest)		
Wild Cat Placer Claim, Nevada County, Calif. (5/9ths interest)		
Live Oak Claim, Placer County, Calif.		
Total mining claims	250.00	250.00
Total	\$29,411.86	\$46,050.00

(1) Subject to lease to Union Oil Company of California.

(2) Subject to lease to N. Nincovich.

(3) Subject to lease to L. G. Helm.

The above realizable values are based upon estimates made by
Mr. E. S. St. Clair.

St. Clair Estate Company
Statement of Earned Surplus
For the Period From January 1, 1938, to December 6, 1938

Balance—January 1, 1938.....	\$311,270.50
Adjustment—value assigned to company's interest in 70 acres parcel in Section 6-11-23, Kern County.....	899.22
Adjusted Balance, January 1, 1938.....	\$312,169.72
Net Income	24,298.81
Total.....	\$336,468.53
Dividends	84,000.00
Balance—December 6, 1938.....	\$252,468.53

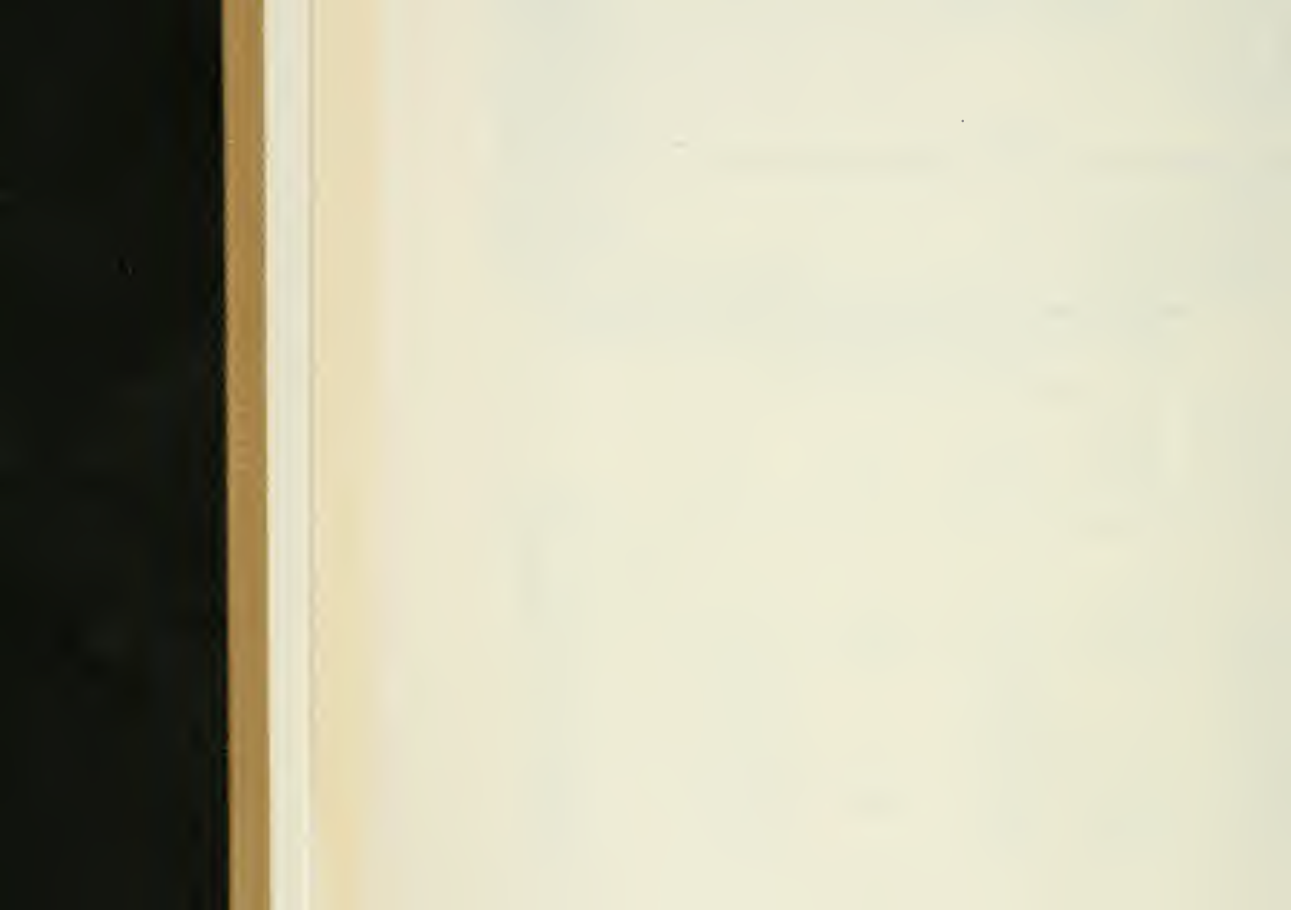
St. Clair Estate Company
Stockholders' Accounts
From January 31, 1929, to December 6, 1938

	Total	L. P. St. Clair	E. S. St. Clair	F. C. St. Clair	Sec. First Nat'l Bk., Trustee
Dividends declared.....	\$250,000.00	\$62,500.00	\$62,500.00	\$62,500.00	\$62,500.00
Less dividend payments:					
1929.....	31,500.00	8,000.00	8,000.00	8,000.00	7,500.00
1930.....	24,968.00	7,000.00	5,868.00	4,600.00	7,500.00
1931.....	8,321.00		2,821.00		5,500.00
1932.....	9,000.00		3,000.00		6,000.00
1933.....	8,000.00		2,000.00		6,000.00
1934.....	7,000.00		1,000.00		6,000.00
1935.....	10,301.00		4,301.00		6,000.00
1936.....	30,500.00	8,000.00	8,500.00	8,000.00	6,000.00
1937.....	17,200.00		5,200.00	6,000.00	6,000.00
1938.....	6,000.00				6,000.00
Total.....	\$152,790.00	\$23,000.00	\$40,690.00	\$26,600.00	\$62,500.00
Remainder..\$	97,210.00	\$39,500.00	\$21,810.00	\$35,900.00	nil
Less other items chargeable to stockholders' accounts	3,516.70	2,866.80	649.90		
Balance, Dec. 6, 1938..\$	93,693.30	\$36,633.20	\$21,160.10	\$35,900.00	nil

St. Clair Estate Company
Estimated Realizable Value of Assets
December 6, 1938

Cash	\$ 8,199.06
Dividends and Notes Receivable	5,038.42
Marketable Securities	285,996.13
Other Securities	77,409.10
Property	46,050.00
	<hr/>
Total.....	\$422,692.71
Less Accounts Payable to Stockholders and Accrued Taxes..	94,191.65
	<hr/>
Net Realizable Value.....	<u><u>\$328,501.06</u></u>

Note: Marketable securities have been valued at the last bid or sale prices on December 6, 1938. The other assets are stated at values as estimated by Mr. E. S. St. Clair.



St. Clair Estate Company
(Incorporated in California)
Balance Sheet, December 31, 1937, and January 31, 1929, and Comparison

Assets	December 31, 1937	January 31, 1929	Increase (Decrease)
Accounts and Notes Receivable—	\$ 5,907.13	\$ 44,142.99	\$ (38,235.86)
Stockholders:			
M. Cooper:			
Dividend account	15,000.00		15,000.00
Other	2,750.00	14,467.87	(11,717.87)
P. St. Clair (suspense item originating in 1917)	2,866.80	2,866.80	
Total	\$ 20,616.80	\$ 17,334.67	\$ 3,282.13
Accounts and notes receivable—			
Others:			
Sunset Oil Company	3,437.50		3,437.50
H. H. Warren	345.39		345.39
Alex Oil Company	143.35		143.35
Bakersfield Laundry Association	25.00		25.00
Total	3,951.24		3,951.24
Investment Securities	418,452.35	387,920.80	30,531.55
Property:			
Unimproved lands	20,873.84	22,190.44	(1,316.60)
Leases		1,775.00	(1,775.00)
Mining claims	250.00	250.00	
Hollywood residence property— land and building	14,974.02	14,406.30	567.72
Total	36,097.86	38,621.74	(2,523.88)
Less reserve for depreciation	7,416.40	3,617.76	3,798.64
Net depreciated value	28,681.46	35,003.98	(6,322.52)
Total	\$477,608.98	\$484,402.44	\$ (6,793.46)

Liabilities	December 31, 1937	January 31, 1929	Increase (Decrease)
Note payable to Bank of America			
National Trust & Savings Association	\$ 7,900.00		\$ 7,900.00
Account payable to broker	191.38		191.38
Accounts payable—stockholders:			
L. P. St. Clair (dividend account)	12,500.00		12,500.00
F. C. St. Clair (dividend account)	14,900.00		14,900.00
E. S. St. Clair	1,360.10	6,477.12	(5,117.02)
Total	28,760.10	6,477.12	22,282.98
Stated Capital and Surplus:			
Stated capital (authorized and outstanding, 1,200 shares of \$20.00 each)	24,000.00	24,000.00	
Paid-in surplus	105,487.00	105,487.00	
Earned surplus	311,270.50	348,438.32	(37,167.82)
Total	\$440,757.50	\$477,925.32	\$ (37,167.82)
Total	\$477,608.98	\$484,402.44	\$ (6,793.46)



St. Clair Estate Company
Statement of Income
For the Period From February 1, 1929, to December 31, 1937, by Periods

	Total	2/1/1929 to 12/31/1929	1930	1931	1932	1933	1934	1935	1936	1937
Revenues:										
Dividends on stocks.....	\$190,173.84	\$27,454.72	\$32,047.88	\$25,636.09	\$11,922.50	\$11,471.25	\$12,630.87	\$13,450.93	\$25,155.03	\$30,404.57
Interest on bank accounts, etc.....	3,049.82		2,040.03	108.20	90.93	149.09	97.85	227.04	14.78	321.90
Share of partnership profits (Beverly Oil Co.)	7,808.39					2,961.56	1,442.94	1,216.08	1,721.19	466.62
Bonuses received as consideration for leases....	30,777.15		25,000.00					319.65	5,457.50	
Oil royalties	7,716.59								4,358.90	3,357.69
Miscellaneous	803.02		127.56	246.31		12.00	12.50	266.23	71.49	66.93
Total revenues	240,328.81	27,454.72	59,215.47	25,990.60	12,013.43	14,593.90	14,184.16	15,479.93	36,778.89	34,617.71
Expenses:										
Management compensation (E. S. St. Clair)...	21,400.00	2,200.00	2,400.00	2,400.00	2,400.00	2,400.00	2,400.00	2,400.00	2,400.00	2,400.00
Legal and accounting fees.....	1,716.05	932.05	85.00	240.00	70.00	72.50	56.50	60.00	55.00	145.00
Insurance and repairs—Hollywood property..	841.37	51.00				51.00		702.00	37.37	
County property taxes.....	6,031.37	195.72	1,073.04	825.36	705.37	747.85	537.20	676.27	559.11	711.45
California franchise tax.....	689.31	50.00	53.75	96.24	25.00	25.00	25.00	25.00	17.30	372.02
Federal income and capital stock taxes.....	3,127.06		34.52		.40	.92	251.22	532.12	500.00	1,807.88
Interest	12,727.40	1,572.46	5,572.69	1,356.44	781.28	693.86	651.92	770.92	652.40	675.43
Contribution to Mercy Hospital.....	500.00			500.00						
Subscriptions to financial services.....	305.78	75.78	20.00		10.00	10.00	20.00		25.00	145.00
Miscellaneous	693.84	6.17	41.40	42.89	106.22	234.86	70.16	28.19	35.38	128.57
Total expenses	48,032.18	5,083.18	9,280.40	5,460.93	4,098.27	4,235.99	4,012.00	5,194.50	4,281.56	6,385.35
Net Income	\$192,296.63	\$22,371.54	\$49,935.07	\$20,529.67	\$ 7,915.16	\$10,357.91	\$10,172.16	\$10,285.43	\$32,497.33	\$28,232.36

Note: In the determination of the net income shown above no consideration has been given to profits or losses arising from the sale or other disposition of assets which have been credited or charged to earned surplus as the case may be.



St. Clair Estate Company
Investment Securities
December 31, 1937

Listed Securities:	Shares	Book Value
Union Oil Company of California.....	8,898	\$178,210.96
Transamerica Corporation	*2,096	48,910.64
Shell Union Oil Company.....	2,077	28,745.81
Honolulu Oil Company.....	1,000	39,906.26
Allis-Chalmers Manufacturing Co.....	150	7,622.50
Standard Oil Company of Indiana.....	100	4,907.50
U. S. Pipe & Foundry.....	100	3,295.00
Southern California Gas Company, 6% pfd.....	356	7,453.75
Unlisted Securities:		
Bakersfield Laundry Association (100% owned)	200	20,000.00
Calex Oil Company (50% owned).....	12,000	32,935.14
Bank of America Nat'l Trust & Savings Assn...	419	23,045.00
Bancamerica Blair Corporation.....	83	996.00
San Joaquin Compress & Warehouse Company	25	700.00
Bakersfield Investment Company.....	100	8,514.69
Padre Hotel Corporation.....	20	2,000.00
West Coast Life Insurance Company.....	52	596.00
S. W. & B. Oil Company.....	53,631	5,363.10
Bakersfield Sandstone Brick Company.....	93	3,750.00
Sun Maid Raisin Growers Assn., pfd.....	5	500.00
B.P.O.E. Building, Bakersfield, preferred.....	1,025	1,000.00
Total.....		<u>\$418,452.35</u>

* Represents number of shares of new stock, which the Company will receive upon surrender of certificates for 4,189 shares of old stock not exchanged. The exchange is to be made on the basis of 2 shares of old stock for one share of new stock.

St. Clair Estate Company
Unimproved Lands, December 31, 1937

Kern County, California :	Book Value
N.W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of Section 20 Township 28 Range 24 (480 acres)	\$ 4,800.00
E. $\frac{1}{2}$ of S.E. $\frac{1}{4}$ of Section 18 Township 11 Range 19 (80 acres)	(1) 800.00
N.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$, S. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$, 5 acres in N.W. corner of S.E. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ and 5 acres in S.W. corner of S.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of Section 6 Township 11 Range 23 (70 acres)— $\frac{1}{8}$ interest	(2)* nil
W. $\frac{1}{2}$ of E. $\frac{1}{2}$ of W. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ and W. $\frac{1}{2}$ of W. $\frac{1}{2}$ of N.W. $\frac{1}{4}$ of Section 1 Township 29 Range 21 and E. $\frac{1}{2}$ of E. $\frac{1}{2}$ of N.E. $\frac{1}{4}$ of Section 2 Township 29 Range 21 (100 acres)	10,000.00
Westerly 100 acres of S.W. $\frac{1}{4}$ of Section 28 Township 30 Range 27	(3) 3,060.26
Los Angeles County, California :	
S. 209.17 feet of Lot 5 of South Gardena Tract— $\frac{1}{4}$ interest....	2,213.58
Total.....	<u>\$20,873.84</u>

(1) Subject to lease to Union Oil Company of California.

(2) Subject to lease to N. Nincovich.

(3) Subject to lease to L. G. Helm.

* Value assigned to the two parcels of land in Section 6 Township 11 Range 23 (70 acres and 43 acres) as of February 25, 1915, \$5,000.00, was extinguished through the sale of the 43 acre parcel in 1936.

St. Clair Estate Company

Statement of Earned Surplus

For the Period From February 1, 1929, to December 31, 1937

Balance, February 1, 1929.....	\$348,438.32
Net Income	192,296.63
Total	<u>\$540,734.95</u>

Deduct:

Dividends:

From surplus at February 1, 1929.....	\$ 32,000.00
From current earnings.....	134,000.00

Loss on sale or other disposition of assets (net) :

Investment securities:

Transamerica Corporation	\$9,503.44
Bethlehem Steel Corporation.....	5,875.25
Paramount Public Corporation.....	5,440.00
General Motors Corporation.....	1,505.80
Union Oil Company of California.....	18,439.54
Shell Union Oil Company.....	1,993.37
Bankers Investment Association.....	673.68
Antelope Heights Orange Company....	8,578.27
Tejon Oil Company.....	(1,072.32)
Coalinga Central Oil Company.....	(462.04)
Leases quitclaimed	1,775.00
Total	<u>\$52,249.99</u>

Less excess of proceeds from sale of real
estate over the book value thereof.....\$7,052.05

Remainder 45,197.94

Account with Cora M. Cooper originating prior to

January 31, 1929, written off.....	14,467.87
Depreciation of Hollywood building.....	3,798.64

Total\$229,464.45

Balance, December 31, 1937.....\$311,270.50

St. Clair Estate Company

Dividend Payments

For the Period From February 1, 1929, to December 31, 1937

Year	Total	L. P. St. Clair	E. S. St. Clair	F. C. St. Clair	Cora M. Cooper
1929.....	\$ 32,000.00	\$ 8,000.00	\$ 8,000.00	\$ 8,000.00	\$ 8,000.00
1930.....	24,468.00	7,000.00	5,868.00	4,600.00	7,000.00
1931.....	8,321.00		2,821.00		5,500.00
1932.....	9,000.00		3,000.00		6,000.00
1933.....	8,000.00		2,000.00		6,000.00
1934.....	7,000.00		1,000.00		6,000.00
1935.....	10,301.00		4,301.00		6,000.00
1936.....	30,500.00	8,000.00	8,500.00	8,000.00	6,000.00
1937.....	24,000.00	6,000.00	8,000.00	6,000.00	6,000.00
<hr/>					
Total	\$153,590.00	\$29,000.00	\$41,490.00	\$26,600.00	\$56,500.00

St. Clair Estate Company

Statement of Assets Received by the Corporation as Consideration for
the Issuance of Capital Stock as of March 7, 1903

Cash	\$ 45,909.45
Notes Receivable	10,427.55

Securities:

Bakersfield Laundry Association (190 shares)	\$25,000.00
First National Bank of Bakersfield (25 shares)	2,500.00
Senator Oil Company (4,700 shares)	4,700.00
Aztec Oil Company (1,000 shares)	1,000.00
Monte Cristo Oil Company (1,000 shares) ..	400.00
Bakersfield Hardware Company (75 shares) ..	4,400.00
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Total securities	38,000.00

Real Property:

Lots 18, 19, and 20, corner of B and 19th Streets, Bakersfield	\$ 2,800.00
Undivided one-half interest in lot, corner of I and 20th Streets, Bakersfield	6,500.00
All of Block 356 of City of Bakersfield	14,000.00
All of Block 30 of Town of Kern	800.00
N.W. 1/4 and S. 1/2 of Section 20-28-24	4,800.00
Section 17-27-23	3,200.00
E. 1/2 of S.E. 1/4 of Section 18-11-19	800.00
Lots 38 and 43 of Section 1-30-27	2,000.00
Undivided 10/24 of Enterprise mining claim situated nr. Lowell Hill, Nev.	} 250.00
Undivided 10/18 of Wild Cat Placer Mine	
Liveoak claim	
Cemetery lot, Block 84, Union Cemetery	nil

Total real property	35,150.00
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Total	\$129,487.00
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Par Value of Capital Stock Issued	24,000.00
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Paid-in Surplus	\$105,487.00
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Note: The values of securities and real property as stated above are
cost or approximate realizable value as of March 7, 1903, as esti-
mated by E. S. St. Clair.

St. Clair Estate Company
Estimated Value of Assets as of March 1, 1913

Securities:	Probable Date of Acquisition	Shares	Amount
Antelope Heights Orange Co.....	1907	9,933 $\frac{1}{3}$	\$ 24,833.33
Bakersfield Laundry Association	1903	200	40,000.00
Bakersfield Sandstone Brick Co.....	1904	75	3,750.00
Calloma Oil Company.....	1904	16,000	16,000.00
Coalinga Central Oil Company.....	1907	449,995	68,000.00
First National Bank of Bakersfield.....	1903	25	5,425.00
First Bank of Kern.....	1904	60	8,280.00
Imperial Securities Co.	1905	5,000	250.00
Pacific Metals Co.....	1913	23 }	2,058.00
Pacific Metals Co. Pfd.....	1913	121 }	
Petroleum Investment Co.....	1913	50	6,800.00
Producers Transportation Co.....	1913	10	1,000.00
S. W. & B. Oil Company.....	1904	53,631	26,815.50
Security Trust Co.....	1911	75	9,750.00
Tejon Oil Company.....	1909	4,500	45,000.00
Union Oil Company of California.....	1913	230	23,000.00

Real Property:

N W $\frac{1}{4}$ and S $\frac{1}{2}$ of Sec. 20-28-24.....	1903	4,800.00
E $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 18-11-19.....	1903	800.00
43 acres in Sec. 6-11-23 ($\frac{1}{8}$ interest).....	1910	29,300.00
70 acres in Sec. 6-11-23 ($\frac{1}{8}$ interest).....	1910	47,800.00

Leases:

St. Clair and Jastro.....	1908	28,389.06
Calloma Extension Oil Company (partnership)	1908	14,705.64
Mining Claims	1903	250.00

Total.....\$407,006.53

Notes: The assets shown above represent those recorded on the books as of February 25, 1915 (date as of which books of the Company were first opened), and inasmuch as there is no record of sales of assets between March 1, 1913, and February 25, 1915, it has been assumed that the assets at both dates were identical.

The amounts at which the assets are stated represent generally values established by Mr. E. S. St. Clair based upon his knowledge of the values as of March 1, 1913.

The assets shown as having been acquired in 1903 were acquired by the Company in connection with the issuance of its capital stock in that year. The dates of acquisition as to the remaining assets were estimated by Mr. E. S. St. Clair.

St. Clair Estate Company
Assets Recorded on Books in Opening Entry February 25, 1915

Cash\$ 2,841.39

Securities:	Shares	
Bakersfield Laundry Association.....	200	\$20,000.00
Antelope Heights Orange Co.....	9,933 $\frac{1}{3}$	24,833.33
Coalinga Central Oil Company.....	449,995	50,000.00
Calloma Oil Company.....	16,000	8,000.00
Tejon Oil Company.....	4,500	4,500.00
Bakersfield Sandstone Brick Co.....	75	3,750.00
First National Bank of Bakersfield....	25	5,425.00
First Bank of Kern.....	60	8,280.00
Imperial Securities Company.....	5,000	250.00
Pacific Metals Company.....	23	2,300.00
Pacific Metals Company, pfd.....	121	12,100.00
Petroleum Investment Company.....	50	6,800.00
Producers Transportation Company	10	1,000.00
S. W. & B. Oil Company.....	53,631	5,363.10
Security Trust Company.....	75	9,750.00
Union Oil Company of California.....	230	23,000.00

Total securities 185,351.43

Unimproved Lands:

N.W. $\frac{1}{4}$ and S. $\frac{1}{2}$ of Section 20 Township 28 Range 24, Kern County (480 acres)	4,800.00
E. $\frac{1}{2}$ of S.E. $\frac{1}{4}$ of Section 18 Township 11 Range 19, Kern County (80 acres).....	800.00
$\frac{1}{8}$ interest in two parcels of land in Section 6 Township 11 Range 23, Kern County (70 acres and 43 acres).....	5,000.00

Total unimproved lands..... 10,600.00

Leases:

$\frac{1}{2}$ interest in N.E. $\frac{1}{4}$ of N.E. $\frac{1}{4}$ of Section 6 Township 28 Range 29, Kern County (40 acres)	10,000.00
$\frac{1}{2}$ interest in N.W. $\frac{1}{4}$ of S.E. $\frac{1}{4}$ of N.W. $\frac{1}{4}$ of Section 31 Township 28 Range 28, Kern County (10 acres).....	10,000.00

Total leases 20,000.00

Mining Claims:

Lowell Hill Mining District, Nevada County, Calif.: Wilkinson placer claim—	
10/24 interest	100.00
Wildeat mining claim—5/9 interest.....	100.00
Dutch Flat, Placer County, Calif.:	
Live Oak placer claim.....	50.00
Total mining claims.....	250.00
Total assets	\$219,042.82
Less Bills Payable.....	5,535.00
Net Assets	<u>\$213,507.82</u>

Exhibit D

Friday, December 23rd, 1938

Court met at 10:00 A. M.

Present: Hon. W. L. Bradshaw, Judge
W. V. Freeman, Deputy Clerk
John Jepsen, Bailiff

No. 33053

Cora M. St. Clair

vs.

St. Clair Estate Co., etc., et al.

In the above entitled matter upon ex parte application of Mortimer Kline of counsel for the defendants, pursuant to Section 937 of the C.C.P. and good cause appearing therefor, it is by the Court Ordered that the temporary restraining order heretofore issued herein is hereby modified as follows:

That the words "Declaring or" be stricken from Paragraph 2, line 31 on page 2, and

the words "equalizing dividends and" be stricken from Paragraph 2, line 3, on page 3. [98]

State of California
County of Kern—ss.

I, R. J. Veon, County Clerk and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original Minute Order on file in my office and that I have carefully compared the same with the original.

Witness my hand and seal of the Superior Court this 9th day of February, 1945.

[Seal] R. J. VEON,
County Clerk and Ex-Officio
Clerk, Superior Court.

By L. REAGAN,
Deputy Clerk. [99]

Exhibit E

Friday, April 28, 1939

Court Met at 10:30 a.m.

Present: Hon. A. Caminetti, Judge.
F. Roy Davis, Reporter.
Leo D. Rapp, Deputy Clerk.
W. J. Littlefield, Bailiff.

No. 33107

In the Matter of
ST. CLAIR ESTATE COMPANY, a Corporation,
In the Process of Voluntary Winding Up.

The above-entitled matter came on regularly at

this time today for the purpose of hearing the Petition for Partial Distribution of one of the Stockholders, Cora M. St. Clair with the said Corporation appearing by counsel Harry Conron and Mortimer A. Kline, and with the Petitioner appearing by her counsel Warren E. Libby and R. Y. Burum, all present in open court.

Cause proceeds as follows, to-wit:

Comes now Mortimer A. Kline of counsel for the corporation and moves the Court for Permission to file an answer to the said petition for distribution and good cause appearing therefore, now it is by the Court ordered that said answer may be filed.

Said Answer is filed in open court.

Comes now Mortimer A. Kline and files in open court a motion to Modify the Nunc Pro Tunc order on file herein and made as of February 6th, 1939, and signed by Hon. Louis Drapeau, Judge.

By and at the request of counsel; said record shows that a copy of both the above documents was served in open court upon the counsel present.

Comes now Warren E. Libby of counsel for the Petitioner Cora M. St. Clair and moves the Court to be permitted to Amend the Petition on filed herein for Partial Distribution by adding the name of Leonard St. Clair as one of the Petitions and good cause appearing therefore, now it is by the Court Ordered that said amendment be made by interlineation by the Clerk of the Court.

A statement of Haskins and Sells of the St. Clair Estates Company, as of December 6th and being designated as Exhibit A attached to the petition for

the appointment of a Certified Public Accountant, now offered and received into evidence, marked and filed as Petitioners Exhibit No. 12 and allowed to retain its original place in the files of the above-entitled cause.

Petitioners Exhibit No. 1 now offered in evidence and received by reference, the same being the minutes of the Meeting of the Board of Directors of the above corporation as of December 23rd, 1938.

Counsel for the respective parties stipulate that the marketable value of the Corporation properties is placed at \$250,000.00 in place of and instead of \$285,996.13 as set forth on the Petitioners Exhibit No. 12.

12:20 Noon. The Court at this time took the regular noon day recess until 1:15 p.m. of this day.

Court Met at 1:15 P.M.

Present: Hon. A. Caminetti, Judge.

F. Roy Davis, Reporter.

Leo D. Rapp, Deputy Clerk.

W. J. Littlefield, Bailiff.

No. 33107

In the Matter of

ST. CLAIR ESTATE COMPANY, a Corporation,
In the Process of Voluntary Winding Up. [100]

Friday, April 28, 1939.

The above-entitled matter came on regularly at this time today for further hearing upon the petition for partial distribution with the Corporation appearing by its counsel Mortimer A. Kline and Harry Conron, and with the Petitioner Cora M. St. Clair appearing by her counsel Warren E. Libby

and R. Y. Burum, all present in open court.

Cause proceeds as follows, to wit:

A statement showing the values of the assets of the Corporation as of certain dates, offered and received in evidence, marked and filed as Respondent corporations Exhibit B.

Counsel present argument and submit the said motion to modify to the Court for consideration and decision and now after due consideration and being fully advised in both the law and the premises, it is by the Court Ordered that the said motion be and the same is hereby denied;

In re Petition for Partial Distribution, counsel for the respective parties enter into the following stipulation:

“Mr. Kline: Now your Honor, I have the following suggestion to make in the form of a stipulation.

That your Honor make an order authorizing and directing the St. Clair Estate Company to pay to its stockholders the total sum of Twenty-Four thousand Dollars, payable as follows:

One: To Security First National Bank of Los Angeles, Trustee for Cora M. St. Clair, Six thousand dollars;

Two: F. C. St. Clair, Six thousand dollars;

Three: E. S. St. Clair, six thousand dollars;

Four: L. P. St. Clair & L. A. Church & Company, a copartnership as pledgee, six thousand dollars;

Five: It is understood that the foregoing sums shall be charged against said stockholders' accounts on the books of the St. Clair Estate Company and shall be deducted from or withheld from any moneys or property hereafter payable to said stockholders

by the corporation, the St. Clair Estate Company.”

All counsel enter into the above-stipulation and same is reduced to writing and signed by the counsel present.

All counsel being in accord, the Court makes its order in accordance with the above-stipulation. [101]

EXHIBIT F

In the Superior Court of the State of California,
In and for the County of Kern

No. 33107

In the Matter of
ST. CLAIR ESTATE COMPANY, a Corporation,
In the Process of Voluntary Winding Up.

ORDER CONSTRUING ORDER OF DISTRIBUTION OF

April 28, 1939

The above-entitled matter came on regularly for hearing upon the petition of Cora M. St. Clair, Leonard St. Clair and Security First National Bank of Los Angeles, California, for the construction by the Court of the former order of April 28, 1939, distributing Twenty-four Thousand Dollars (\$24,000.00) to stockholders of St. Clair Estate Company, Warren E. Libby and Osborn, Burum and Shortridge, by Warren E. Libby and R. Y. Burum, appearing for petitioners, Andrews and Kline, formerly Andrews, Blanche & Kline, by Mortimer A. Kline, and Borton, Petrini, Conron & Borton, by F. E. Borton, appearing for the Corporation, upon the 31st day of August, 1939, before the Honorable

H. S. Gans, Judge of the above-entitled Court, and arguments of Counsel having been heard on the matter and it appearing to the Court that an order was made on April 28, 1939, pursuant to stipulation of Counsel, by Judge A. Caminetti, Jr., that Twenty-four Thousand Dollars (\$24,000.00) be distributed to the stockholders. Six Thousand Dollars (\$6,000.00) to each, without specification as to whether it was to be out of income or capital assets of the corporation; and that pursuant to said order Six Thousand Dollars (\$6,000.00) was paid to the Trustee for Cora St. Clair;

And it further appearing that said money is being held [102] by said Trustee and will not be paid to the said Cora St. Clair until an order is made by this Court construing or modifying said order, so as to designate that said payments were to be made out of income and not from capital assets, and the Court being fully advised in the premises and the same being submitted to the Court,

It Is Hereby Ordered that the order of distribution heretofore made herein on the 28th day of April, 1939, is hereby construed to be a distribution and payment of the sum of Twenty-four Thousand Dollars (\$24,000.00), Six Thousand Dollars (\$6,000.00) to each stockholder, from the income of St. Clair Estate Company, rather than from its capital assets.

Dated: October 13, 1939.

[Seal] /s/ H. S. GANS,

Judge of Said Superior Court.

[Endorsed]: Filed Oct. 16, 1938, Superior Court.

Exhibit G

Minutes of Meeting of Board of Directors of St.
Clair Estate Company Held December 27, 1939

The undersigned being all of the directors of St. Clair Estate Company hereby consent that a special meeting of the directors of said company be held at 11 o'clock a.m. of the 27th day of December, 1939, at the office of the company, 1517 20th Street, Bakersfield, California, for the purpose of reviewing the business and events of the past year and transacting any and all business affecting the company which may come before the meeting, including the declaration and payment as dividends of earnings of the company for the year 1939, hereby waiving all notice of time, place and purpose of meeting and consenting that said meeting may be held and any business affecting the company may be transacted thereat whether or not all directors be present.

Dated: December 27, 1939.

/s/ L. P. ST. CLAIR,

/s/ L. W. LOWELL,

/s/ C. S. CURRAN,

/s/ E. S. ST. CLAIR,

/s/ F. C. ST. CLAIR.

Pursuant to the foregoing consent of all directors, a special meeting of the board of directors of St. Clair Estate Company was held at the office of the

company at Bakersfield, California at the time and place specified in said consent.

Present: Directors L. P. St. Clair, L. W. Lowell, C. S. Curran, E. S. St. Clair and F. C. St. Clair.

President E. S. St. Clair presiding and the following business was transacted: The President reported the progress of the action instituted by [104] Cora St. Clair in the Superior Court of the State of California In and For the County of Kern Against St. Clair Estate Company, a corporation, L. P. St. Clair, E. S. St. Clair, F. C. St. Clair and others, entitled minority stockholders suit; and that concurrently with the filing of said complaint a temporary restraining order was issued and was served enjoining and prohibiting the distribution of any assets of St. Clair Estate Company, including the payment of dividends to stockholders; and that by reason of the pendency of said action and restraining order, the corporation and seventy-five per cent in interest of its stockholders have been enjoined against their will from completing the winding up and dissolution of the St. Clair Estate Company;

The President further stated, and the Board of Directors unanimously agreed, that pursuant to proceedings commenced and then in progress, all of the assets of the Corporation would have been completely distributed to the persons entitled thereto during the year 1938 and the Corporation would have been completely wound up and dissolved save for the filing of said legal proceedings and issuance of said restraining order and injunction.

The President further stated that the tax advisers

had stated that it was probable the St. Clair Estate Company would be held to be a personal holding company, in contemplation of the Revenue Act of 1938; and that under such Act a personal holding company is subject to severe penalties in case of failure to distribute its net income as dividends to its stockholders; and that these penalties amount to sixty-five per cent of the first \$2,000.00 of undistributed net income and seventy-five per cent on the remainder—and that this is in addition to the normal income tax imposed upon such Corporation.

The President further stated that it is estimated the net income for the Company for the year 1939 will be approximately \$23,000.00. Computations were then made of such penalties, computed on net income of \$23,000.00 and the same were found to be in excess of \$15,000.00 in addition to normal income tax computed on said net income. The amount of penalties and tax the President stated, and the Directors unanimously agreed, would in effect confiscate substantially all of the net earnings of the Corporation for the year.

The President further reported that order of court had been secured [105] authorizing a dividend distributing said net earnings for the Company for the year 1939.

A full discussion of the said matters followed, whereupon a motion of Director L. P. St. Clair, seconded by Director F. C. St. Clair, the following resolution was unanimously adopted:

Whereas, the St. Clair Estate Company com-

menced proceedings in the year 1938 for winding up said corporation, and

Whereas, said winding up and dissolution would have been completed save for the fact that action was instituted in the Superior Court of Kern County bearing number 33053 by Cora St. Clair, as plaintiff, against the corporation and its directors as aforesaid wherein and whereby the corporation was enjoined and restrained from the payment and distribution of assets or dividends, and

Whereas, such action is contrary to the express wishes of the owners or holders of seventy-five per cent (75%) of the issued capital stock of St. Clair Estate Company, and

Whereas, it is believed St. Clair Estate Company may be held to be "a personal holding company" within the meaning of that term as set forth in the Revenue Act of 1938, and will suffer heavy penalties unless distribution is made of its net income earned for the calendar year 1939, which is estimated to be \$23,000.00, and

Whereas, it is the express wish and desire of the St. Clair Estate Company and its directors fully to comply with the provisions of said Act and to [106] avoid the imposition of such heavy penalty taxes,

Now Therefore, Be It Resolved: That a dividend, payable forthwith, of \$19.16-2/3 per share on the outstanding stock of the company and aggregating \$23,000.00 be and the same is hereby declared and shall be payable in the year 1939 as follows:

To Security-First National Bank of Los Angeles,
Trustee for

Cora St. Clair Cooper.....	\$5,750.00
F. C. St. Clair.....	5,750.00
E. S. St. Clair.....	5,750.00
L. P. St. Clair.....	5,750.00

Resolved, Further, that all of the acts of the officers of the company in making expenditures and disbursements, receiving and handling of revenues, the employment of Messrs. Haskins & Sells, certified public accountants for accounting and income tax service and assistance, the engaging of Messrs. Borton, Petrini, Conron & Borton of Bakersfield and Messrs. Andrews and Kline of Los Angeles as attorneys to appear for and on behalf of the corporation, be and the same are hereby all and singular approved, ratified and confirmed; and

Whereas, there is now only approximately \$13,000.00 available for dividend purposes, retaining sufficient money for necessary working capital, and [107]

Whereas, it is necessary to borrow \$10,000.00 in order to pay the earnings for the year 1939 as dividends to the shareholders, and

Whereas, Warren E. Libby, representing Cora St. Clair Cooper and the Security-First National Bank of Los Angeles, Trustee for Cora St. Clair Cooper, has consented that moneys be borrowed in order to effect said dividend payment.

A full discussion of said matter followed, whereupon on motion of Director L. P. St. Clair, and

seconded by Director C. S. Curran, the following resolution was unanimously adopted:

Now, Therefore, Be It Resolved: That this corporation borrow from the Bank of America National Trust & Savings Association at Bakersfield, California, the sum of \$10,000.00, and that the President and Secretary be, and they are hereby authorized in the name of the corporation to execute a promissory note upon such terms as they may deem advisable, and to hypothecate and pledge such stock or other securities of the corporation as may be necessary or required by the Bank of America National Trust & Savings Association to make said loan.

Upon motion duly made and carried, the meeting was adjourned.

F. C. ST. CLAIR,
Secretary.

E. S. ST. CLAIR,
President. [108]

Exhibit H

Form 1040—Treasury Dept. Internal Revenue Service

Page 1

United States Individual Income Tax Return—1939

(Auditor's Stamp) and (Cashier's Stamp)—[Blank].

(Name) L. P. St. Clair

Res. 210 South Occidental Boulevard Office 312 Union Oil Building
(P.O.) Los Angeles (County) Los Angeles (State) California

Income

1. Salaries and other compensation for personal services.
(From Schedule A)\$24,994.15
2. Dividends 13,967.65
- [Items 3 to 9—no data shown]
10. (a) Net short-term gain from sale or ex-
change of capital assets.....
- (b) Net long-term gain (or loss) from sale or
exchange of capital assets. (From
Schedule F) 249.49 Loss
- (c)—[no data shown]
11. Other income (including income from
annuities) (State nature)..... 2,506.12
12. Total income in items 1 to 11.
(Enter nontaxable income in Schedule I) ..\$41,218.43

Deductions

13. Contributions paid. (Explain in Sched. H) ..\$ 600.00
14. Interest. (Explain in Schedule H) 7,435.17
15. Taxes. (Explain in Schedule H) 1,256.08
- [Items 16 to 18—no data shown]
19. Total deductions in items 13 to 18..... 9,291.25
20. Net income (item 12 minus item 19).....\$31,927.18

Computation of Tax

21. Net income (item 20 above).....\$31,927.18
22. Less: Personal exemption.
(From Schedule J-1)\$1,250.00
23. Credit for dependents.
(From Schedule J-2) 1,250.00
24. Balance (surtax net income).....\$30,677.18
25. Less: Interest on Govt. obligations etc.....
26. Earned income credit.
(From Schedule K-1 or K-2)\$1,400.00 1,400.00

27. Balance subject to normal tax.....	\$29,277.18
28. Normal tax (4% of item 27).....	\$ 1,171.09
29. Surtax on item 24. (See Instruction 29).....	3,128.66
30. Total (item 28 plus item 29).....	\$ 4,299.75
31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F).....	\$ 4,299.75

[Items 32 and 33—no data shown]

34. Balance of tax (item 31 minus items 32 and 33).....	\$ 4,299.75
---	-------------

Schedule A.—Income Received from Others Consisting of Salaries,
Wages, Fees, and Other Compensation for Personal Services.

(See Instruction 1)

1. Name and address of employer and nature of income	2. Amount
Union Oil Company of California, Los Angeles.....	\$49,988.30
Less: reported by wife.....	24,994.15
3. Expenses (itemize)	4. Amount
	\$24,994.15

[Schedules B, C, and D—no data shown]

Item 2—Dividends

Union Oil Company of California.....	\$15,956.25
Yosemite Park & Curry Company.....	229.05
St. Clair Estate Company.....	11,750.00
	\$27,935.30

Reported by husband.....	\$13,967.65
Reported by wife.....	13,967.65

Item 10 b Schedule F

Net long term loss from sale of capital assets

101 shares Union Oil Company of California stock.

Bought prior to 1931 Cost.....	\$2,858.77
Sold March 24, 1939 for.....	1,860.80

Loss.....	\$ 997.97
-----------	-----------

Reported by husband.....	\$498.99
Reported by wife.....	498.98

Item 11—Other Income

Union Oil Company of California Provident Fund

Annuity payments received.....\$3,453.96

Reported by husband 72.5578%.....\$2,506.12

Reported by wife 27.4422%.....947.84

Division in accordance with ruling of
Internal Revenue Agent on 1938 Return

Item 13—Contributions

Los Angeles Community Chest.....\$ 900.00

St. Johns Major Seminary.....300.00

\$1,200.00

Reported by husband.....\$600.00

Reported by wife.....600.00

Item 14—Interest

Interest paid on personal indebtedness.....\$14,870.34

Reported by husband.....\$7,435.17

Reported by wife.....7,435.17

Item 15—Taxes

City and County taxes 1938-39 on vacant lot (2nd half).....\$ 90.20

City and County taxes 1939-40 on house and
personal property775.50

City and County taxes 1939-40 on other property.....33.19

California State Income Tax, 1938.....1,510.34

California State Income Tax, additional 1935.....102.93

\$2,512.16

Reported by husband.....\$1,256.08

Reported by wife.....1,256.08

Personal Holding Company

L. P. St. Clair owns one-quarter of the stock of the St. Clair
Estate Company, 1517-20th Street, Bakersfield, California

Schedule F.—Gains and Losses From Sales or Exchanges of
Capital Assets. (See Instruction 10)

Long-Term Capital Gains and Losses—Assets Held More Than 24 Mo.

Loss on sale of 101 shares Union Oil Co. stock

per schedule attached\$498.99 \$249.49

Total net long-term capital gain or loss (enter in line 2,

column 3, of summary below).....\$249.49

Summary of Capital Net Gains or Losses

2. Total net long-term capital gain or loss (enter as item 10(b), page 1, amount of gain or loss shown in column 5)....*\$249.49 **\$249.49
- * 3. Net gain or loss to be taken into account from col. 10, above—Loss.
- ** 5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary—Loss.

Computation of Alternative Tax

(To be used only in the case of a net long-term capital gain or loss)

- | | |
|--|-----------------------|
| 1. Net income (item 20, page 1). (See Instruction 10)..... | \$31,927.18 |
| 2. (a) Net long-term capital gain..... | |
| (b) Net long-term capital loss (item 10(b), page 1)..... | 249.49 |
| 3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b)). (See Instruction 10)..... | \$32,176.67 |
| 4. Less: Personal exemption. (From Schedule J-1) | \$1,250.00 |
| 5. Credit for dependents. (From Schedule J-2) | 1,250.00 |
| 6. Balance (surtax net income)..... | \$30,926.67 |
| 7. Less: Interest on Government obligations, etc..... | |
| 8. Earned income credit. (From Schedule K-1 or K-2). (See Inst. 10)..... | \$1,400.00 1,400.00 |
| 9. Balance subject to normal tax..... | \$29,526.67 |
| 10. Normal tax (4% of line 9)..... | \$ 1,181.07 |
| 11. Surtax on line 6. (See Instruction 29)..... | 3,176.07 |
| 12. Partial tax (line 10 plus line 11)..... | \$ 4,357.14 |
| 13. (a) 30% on net long-term capital gain..... | |
| (b) 30% of net long-term capital loss (30% of line 2(b)) | 74.85 |
| 14. Alternative tax (line 12 plus line 13(a) or line 12 minus line 13(b))..... | \$ 4,282.29 |
| 15. Total normal tax and surtax (item 30, page 1)..... | \$ 4,299.75 |
| 16. Tax liability (if a net long-term capital gain, on line 2(a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2(b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)..... | \$ 4,299.75 |

[Schedules G, H, and I—no data shown]

Schedule J.—Explanation of Credits Claimed in Items 22 and 23.

(See Instructions 22 and 23)

(1) Personal Exemption

Status	Credit claimed
Married and living with husband or wife—12 months.....	\$2,500.00
Head of family (explain below).....	1,250.00
Less: reported by wife.....	\$1,250.00

[(2) Credit for Dependents—no data shown]

Schedule K.—Computation of Earned Income Credit. (See Inst. 26)

[(1) If your net income is \$3,000 or less—no data shown]

(2) If your net income is more than \$3,000, use only this part of schedule

Earned net income (not more than \$14,000).....	\$14,000.00
Net income (item 20, page 1).....	31,927.18
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300).....	1,400.00

Questions

1. State your principal occupation or profession.....
2. Check whether you are a citizen (X) or a resident alien (—).
3. If you filed a return for the preceding year, to which Collector's office was it sent? 6th, California.
4. Are items of income or deductions of both husband and wife included in this return? No.
5. State (a) Name of husband or wife if separate return was made
Annastatia St. Clair.
(b) Personal exemption, if any, claimed thereon \$1,250.00.
(c) Collector's office to which it was sent 6th, California.
6. Check whether this return was prepared on the cash (X) or accrual (—) basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") yes. (If answer is "yes," attach statement required by Instruction J.)

[Affidavits. (See Instruction E)—no data shown]

Exhibit I

Form 1040—Treasury Dept. Internal Revenue Service

Page 1

United States Individual Income Tax Return—1939

(Auditor's Stamp) and (Cashier's Stamp)—[Blank].

(Name) Annastatia St. Clair
 210 South Occidental Boulevard
 (P.O.) Los Angeles (County) Los Angeles (State) California

Income

1. Salaries and other compensation for personal services.
 (From Schedule A)\$24,994.15
2. Dividends 13,967.65

[Items 3 to 9—no data shown]

10. (a) Net short-term gain from sale or exchange of capital assets.....
- (b) Net long-term gain (or loss) from sale or exchange of capital assets. (From Schedule F) 249.49 Loss
- (c)—[no data shown]
11. Other income (including income from annuities) (State nature)..... 947.84

12. Total income in items 1 to 11.
 (Enter nontaxable income in Schedule I) ..\$39,660.15

Deductions

13. Contributions paid. (Explain in Sched. H) ..\$ 600.00
14. Interest. (Explain in Schedule H)..... 7,435.17
15. Taxes. (Explain in Schedule H)..... 1,256.08

[Items 16 to 18—no data shown]

19. Total deductions in items 13 to 18..... 9,291.25
20. Net income (item 12 minus item 19).....\$30,368.90

Computation of Tax

21. Net income (item 20 above).....\$30,368.90
22. Less: Personal exemption.
 (From Schedule J-1).....\$1,250.00
23. Credit for dependents.
 (From Schedule J-2)..... 1,250.00
24. Balance (surtax net income).....\$29,118.90
25. Less: Interest on Govt. obligations etc.....
26. Earned income credit.
 (From Schedule K-1 or K-2).....\$1,400.00 1,400.00

27. Balance subject to normal tax.....	\$27,718.90
28. Normal tax (4% of item 27).....	\$ 1,108.76
29. Surtax on item 24. (See Instruction 29).....	2,832.59
<hr/>	
30. Total (item 28 plus item 29).....	\$ 3,941.35
31. Total tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F).....	\$ 3,941.35

[Items 32 and 33—no data shown]

34. Balance of tax (item 31 minus items 32 and 33).....	\$ 3,941.35
---	-------------

Schedule A.—Income Received from Others Consisting of Salaries,
Wages, Fees, and Other Compensation for Personal Services.

(See Instruction 1)

1. Name and address of employer and nature of income	2. Amount
Union Oil Company of California, Los Angeles.....	\$49,988.30
Less: reported by husband.....	24,994.15
3. Expenses (itemize)	4. Amount
	\$24,994.15

[Schedules B, C, and D—no data shown]

Item 2—Dividends

Union Oil Company of California.....	\$15,956.25
Yosemite Park & Curry Company.....	229.05
St. Clair Estate Company.....	11,750.00
<hr/>	
	\$27,935.30
<hr/>	
Reported by husband.....	\$13,967.65
Reported by wife.....	13,967.65

Item 10 b Schedule F

Net long term loss from sale of capital assets

101 shares Union Oil Company of California stock.

Bought prior to 1931 Cost.....\$2,858.77

Sold March 24, 1939 for..... 1,860.80

Loss.....\$ 997.97

Reported by husband.....\$498.99

Reported by wife..... 498.98

Item 11—Other Income

Union Oil Company of California Provident Fund

Annuity payments received.....\$3,453.96

Reported by husband 72.5578%.....\$2,506.12

Reported by wife 27.4422%.....947.8

Division in accordance with ruling of
Internal Revenue Agent on 1938 Return

Item 13—Contributions

Los Angeles Community Chest.....\$ 900.00

St. Johns Major Seminary.....300.00

\$1,200.00

Reported by husband.....\$600.00

Reported by wife.....600.00

Item 14—Interest

Interest paid on personal indebtedness.....\$14,870.34

Reported by husband.....\$7,435.17

Reported by wife.....7,435.17

Item 15—Taxes

City and County taxes 1938-39 on vacant lot (2nd half).....\$ 90.20

City and County taxes 1939-40 on house and
personal property775.50

City and County taxes 1939-40 on other property.....33.19

California State Income Tax, 1938.....1,510.34

California State Income Tax, additional 1935.....102.93

\$2,512.16

Reported by husband.....\$1,256.08

Reported by wife.....1,256.08

Personal Holding Company

L. P. St. Clair owns one-quarter of the stock of the St. Clair
Estate Company, 1517-20th Street, Bakersfield, CaliforniaSchedule F.—Gains and Losses From Sales or Exchanges of
Capital Assets. (See Instruction 10)

Long-Term Capital Gains and Losses—Assets Held More Than 24 Mo.

Loss on sale of 101 shares Union Oil Co. stock

per schedule attached\$498.99 \$249.49

Total net long-term capital gain or loss (enter in line 2,

column 3, of summary below).....\$249.49

Summary of Capital Net Gains or Losses

2. Total net long-term capital gain or loss (enter as item 10(b), page 1, amount of gain or loss shown in column 5).... *\$249.49 **\$249.49
- * 3. Net gain or loss to be taken into account from col. 10, above—Loss.
- ** 5. Total net gain or loss to be taken into account in columns 2, 3, and 4 of this summary—Loss.

Computation of Alternative Tax

(To be used only in the case of a net long-term capital gain or loss)

- | | |
|--|---------------------|
| 1. Net income (item 20, page 1). (See Instruction 10)..... | \$30,368.90 |
| 2. (a) Net long-term capital gain..... | |
| (b) Net long-term capital loss (item 10(b), page 1)..... | 249.49 |
| 3. Ordinary net income (line 1 minus line 2 (a) or line 1 plus line 2 (b). (See Instruction 10)..... | \$30,618.39 |
| 4. Less: Personal exemption. (From Schedule J-1) | \$1,250.00 |
| 5. Credit for dependents. (From Schedule J-2) | 1,250.00 |
| 6. Balance (surtax net income)..... | \$29,368.39 |
| 7. Less: Interest on Government obligations, etc..... | |
| 8. Earned income credit. (From Schedule K-1 or K-2). (See Inst. 10)..... | \$1,400.00 1,400.00 |
| 9. Balance subject to normal tax..... | \$27,968.39 |
| 10. Normal tax (4% of line 9)..... | \$ 1,118.74 |
| 11. Surtax on line 6. (See Instruction 29)..... | 2,879.99 |
| 12. Partial tax (line 10 plus line 11)..... | \$ 3,998.73 |
| 13. (a) 30% on net long-term capital gain..... | |
| (b) 30% of net long-term capital loss (30% of line 2(b)) | 74.85 |
| 14. Alternative tax (line 12 plus line 13(a) or line 12 minus line 13(b))..... | \$ 3,923.88 |
| 15. Total normal tax and surtax (item 30, page 1)..... | \$ 3,941.35 |
| 16. Tax liability (if a net long-term capital gain, on line 2(a), enter line 14 or line 15, whichever is the lesser; if a net long-term capital loss, on line 2(b), enter line 14 or line 15, whichever is the greater). (Enter as item 31, page 1)..... | \$ 3,941.35 |

[Schedules G, H, and I—no data shown]

Schedule J.—Explanation of Credits Claimed in Items 22 and 23.

(See Instructions 22 and 23)

(1) Personal Exemption

Status	Credit claimed
Married and living with husband or wife—12 months.....	\$2,500.00
Head of family (explain below).....	1,250.00
Less: reported by husband.....	\$1,250.00

[(2) Credit for Dependents—no data shown]

Schedule K.—Computation of Earned Income Credit. (See Inst. 26)

[(1) If your net income is \$3,000 or less—no data shown]

(2) If your net income is more than \$3,000, use only this part of schedule

Earned net income (not more than \$14,000).....\$14,000.00

Net income (item 20, page 1).....30,368.90

Earned income credit (10% of earned net income or 10% of
net income, above, whichever amount is smaller, but do
not enter less than \$300).....1,400.00

Questions

1. State your principal occupation or profession.....
2. Check whether you are a citizen (X) or a resident alien (—).
3. If you filed a return for the preceding year, to which Collector's office was it sent? 6th, California.
4. Are items of income or deductions of both husband and wife included in this return? No.
5. State (a) Name of husband or wife if separate return was made
L. P. St. Clair.
(b) Personal exemption, if any, claimed thereon \$1,250.00.
(c) Collector's office to which it was sent 6th, California.
6. Check whether this return was prepared on the cash (X) or accrual (—) basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501? (Answer "yes" or "no") yes. (If answer is "yes," attach statement required by Instruction J.)

[Affidavits. (See Instruction E)—no data shown]

Exhibit J

In the Superior Court of the State of California
In and for the County of Kern

No. 33107

In the Matter of
ST. CLAIR ESTATE COMPANY, a Corporation,
In the Process of Voluntary Winding Up.

STIPULATION

It Is Hereby Stipulated by and between the parties to the above-entitled action by and through their respective counsel as follows: That the Board of Directors of St. Clair Estate Company and said St. Clair Estate Company be and they are hereby authorized and directed to declare and pay to the stockholders of St. Clair Estate Company as dividends, in the calendar year 1939 amounts up to the net earnings of said corporation for the year 1939 and any temporary restraining order or injunction prohibiting such action may be accordingly modified to permit such action.

Dated this 26th day of December, 1939.

WARREN E. LIBBY,
OSBORN, BURUM &
SHORTRIDGE,

By /s/ WARREN E. LIBBY,
Attorneys for Cora M. St. Clair, Leonard St. Clair
and Security First National Bank of Los
Angeles.

BORTON, PETRINI, CONRON
& BORTON,

ANDREWS & KLINE,

By /s/ MORTIMER KLINE,
Attorneys for St. Clair
Estate Company.

It Is So Ordered:

Dated: Dec. 27, 1939.

[Seal] /s/ ROBERT B. LAMBERT,
Judge of the Superior Court.

Exhibit K

Form 1040—Treasury Dept. Internal Revenue Service Page 11

United States Individual Income and Defense Tax Return—1940

(Auditor's Stamp) and (Cashier's Stamp)—[Blank].

(Name) L. P. St. Clair

Res. 210 South Occidental Boulevard Office: 312 Union Oil Building
(P.O.) Los Angeles (County) Los Angeles (State) California

Income

1. Salaries and other compensation for personal services.
(From Schedule A).....\$24,990.00
2. Dividends 10,946.75

[Items 3 through 10—no data shown]

11. Other income (including income from annuities).
(State nature) 2,506.12

12. Total income in items 1 to 11. (Enter
nontaxable income in Schedule 1).....\$38,442.87

Deductions

13. Contributions paid. (Explain in Sched. H)..\$ 225.00
14. Interest. (Explain in Schedule II)..... 7,208.64
15. Taxes. (Explain in Schedule H)..... 1,534.77

[Items 16 to 18—no data shown]

19. Total deductions in items 13 to 18..... 8,968.41

20. Net income (item 12 minus item 19).....\$29,474.46

Computation of Tax

21.	Net income (item 20 above).....	\$29,474.46	
22.	Less: Personal exemption.		
	(From Schedule J-1).....	\$1,000.00	
23.	Credit for dependents.		
	(From Schedule J-2).....		1,000.00
24.	Balance (surtax net income).....	\$28,474.46	
25.	Less: Interest on Govt. obligations, etc.....		
26.	Earned income credit.		
	(From Schedule K-1 or K-2).....	\$1,400.00	1,400.00
27.	Balance subject to normal tax.....	\$27,074.46	
28.	Normal tax (4% of item 27).....	\$ 1,082.98	
29.	Surtax on item 24. (See Instruction 29).....		4,182.34
30.	Total (item 28 plus item 29).....	\$ 5,265.32	
31.	Total income tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F).....	\$ 5,265.32	
[Items 32 and 33—no data shown]			
34.	Balance of income tax (item 31 minus items 32 and 33).....	\$ 5,265.32	
35.	Defense tax (10% of item 31). (See Instruction 35).....		526.53
36.	Total income and defense taxes due (item 34 plus item 35).....	\$ 5,791.85	

Schedule A.—Income Received From Others Consisting of Salaries, Wages, Fees, Commissions, Bonuses, and Other Compensation for Personal Services. (See Instruction 1)

1. Name and address of employer	2. Amount	4. Amount
Union Oil Company.....	\$49,980.00	
Less: reported by wife.....	24,990.00	
Total of col. 2 minus total of col. 4 (enter as item 1, page 1)....		\$24,990.00

[Schedules B, C, D, and E—no data shown]

Item 2—Dividends

Union Oil Company of California.....	\$15,139.00
Yosemite Park & Curry Company.....	254.50
St. Clair Estate Company.....	6,500.00
	<u>\$21,893.50</u>

Reported by husband.....\$10,946.75
 Reported by wife 10,946.75

Item 11—Other Items

Union Oil Company of California Provident Fund

Annuity Payments received.....\$3,453.96

Reported by husband 72.5578%..... 2,506.12

Reported by wife 27.4422%..... 947.84

Division in accordance with ruling of
Federal Internal Revenue Agent

Item 13—Contributions

Los Angeles Community Chest.....\$450.00

Reported by husband.....\$225.00

Reported by wife..... 225.00

Item 14—Interest

Interest paid on personal indebtedness.....\$14,417.28

Reported by husband.....\$7,208.64

Reported by wife..... 7,208.64

Item 15—Taxes

City and County taxes 1940-1941 on home and
personal property\$ 670.79

City and County taxes 1940-1941 on other property..... 96.53

California State Income Tax—1936 additional..... 125.00

1939 2,177.21

\$3,069.53

Reported by husband.....\$1,534.77

Reported by wife 1,534.76

Personal Holding Company

L. P. St. Clair owns one-quarter of the stock of the St. Clair
Estate Company, 1517-20th Street, Bakersfield, California

[Schedules F, G, H, and I—no data shown]

Schedule J.—Explanation of Credits Claimed in Items 22 and 23.

(See Instructions 22 and 23)

Status	Credit claimed
Married and living with husband or wife—12 months.....	\$2,000.00
Head of family (explain below).....	1,000.00
Less: reported by wife.....	1,000.00

[(2) Credit for Dependents—no data shown]

Schedule K.—Computation of Earned Income Credit. (See Inst. 26)

[(1) If your net income is \$3,000 or less—no data shown]

(2) If your net income is more than \$3,000, use only this part of schedule

Earned net income (not more than \$14,000).....	\$14,000.00
Net income (item 20, page 1).....	29,474.46
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300).....	1,400.00

Questions

1. State your principal occupation or profession.....
2. Check whether you are a citizen (X) or a resident alien (—).
3. Did you file a return for any prior year? Yes. If so, what was the latest year? 1939. To which Collector's office was it sent? 6th, California.
4. Are items of income or deductions of both husband and wife included in this return? No.
5. State (a) Name of husband or wife if separate return was made Annastatia St. Clair.
(b) Personal exemption, if any, claimed thereon \$1,000.
(c) Collector's office to which it was sent 6th, California.
6. Check whether this return was prepared on the cash (X) or accrual (—) basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") Yes. (If answer is "yes," attach statement required by Instruction J.)

Affidavit. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by L. P. St. Clair before me this..... day of March, 1941.

Affidavit. (See Instruction E)

(If this return was prepared for you by some other person the following affidavit must be executed)

Subscribed and sworn to before me this..... day of March, 1941.

[Balance of affidavits—no data shown]

Exhibit L

Form 1040—Treasury Dept. Internal Revenue Service Page 1
 United States Individual Income and Defense Tax Return—1940
 (Auditor's Stamp) and (Cashier's Stamp)—[Blank].

(Name) Annastatia St. Clair
 210 South Occidental Boulevard
 (P.O.) Los Angeles (County) Los Angeles (State) California

Income

- | | | |
|------------------------------------|--|-------------|
| 1. | Salaries and other compensation for personal services.
(From Schedule A)..... | \$24,990.00 |
| 2. | Dividends | 10,946.75 |
| [Items 3 through 10—no data shown] | | |
| 11. | Other income (including income from annuities).
(State nature) | 947.84 |
| 12. | Total income in items 1 to 11. (Enter
nontaxable income in Schedule 1)..... | \$36,884.59 |

Deductions

- | | | |
|--------------------------------|---|-------------|
| 13. | Contributions paid. (Explain in Sched. H)..\$ | 225.00 |
| 14. | Interest. (Explain in Schedule II)..... | 7,208.64 |
| 15. | Taxes. (Explain in Schedule II)..... | 1,534.76 |
| [Items 16 to 18—no data shown] | | |
| 19. | Total deductions in items 13 to 18..... | 8,968.40 |
| 20. | Net income (item 12 minus item 19)..... | \$27,916.19 |

Computation of Tax

- | | | |
|-----|--|--------------------------|
| 21. | Net income (item 20 above)..... | \$27,916.19 |
| 22. | Less: Personal exemption.
(From Schedule J-1)..... | \$1,000.00 |
| 23. | Credit for dependents.
(From Schedule J-2)..... | 1,000.00 |
| 24. | Balance (surtax net income)..... | \$26,916.19 |
| 25. | Less: Interest on Govt. obligations, etc..... | |
| 26. | Earned income credit.
(From Schedule K-1 or K-2)..... | \$1,400.00 1,400.00 |
| 27. | Balance subject to normal tax..... | \$25,516.19 |
| 28. | Normal tax (4% of item 27)..... | \$ 1,020.65 |
| 29. | Surtax on item 24. (See Instruction 29)..... | 3,714.86 |
| 30. | Total (item 28 plus item 29)..... | \$ 4,735.51 |

31. Total income tax (item 30, or if you had a net long-term capital gain or loss, enter line 16, Schedule F).....\$ 4,735.51

[Items 32 and 33—no data shown]

34. Balance of income tax (item 31 minus items 32 and 33)..\$ 4,735.51

35. Defense tax (10% of item 31). (See Instruction 35).....473.55

36. Total income and defense taxes due (item 34 plus item 35).....\$ 5,209.06

Schedule A.—Income Received From Others Consisting of Salaries, Wages, Fees, Commissions, Bonuses, and Other Compensation for Personal Services. (See Instruction 1)

1. Name and address of employer	2. Amount	4. Amount
Union Oil Co. of California	\$49,980.00	
Less: reported by husband.....	24,990.00	
Total of col. 2 minus total of col. 4 (enter as item 1, page 1)....		\$24,990.00

[Schedules B, C, D, and E—no data shown]

Item 2—Dividends

Union Oil Company of California.....	\$15,139.00
Yosemite Park & Curry Company.....	254.50
St. Clair Estate Company.....	6,500.00
	<u>\$21,893.50</u>

Reported by husband.....\$10,946.75

Reported by wife 10,946.75

Item 11—Other Items

Union Oil Company of California Provident Fund	
Annuity Payments received.....	\$3,453.96

Reported by husband 72.5578%.....2,506.12

Reported by wife 27.4422%.....947.84

Division in accordance with ruling of
Federal Internal Revenue Agent

Item 13—Contributions

Los Angeles Community Chest.....	\$450.00
----------------------------------	----------

Reported by husband.....\$225.00

Reported by wife..... 225.00

Item 14—Interest

Interest paid on personal indebtedness.....	\$14,417.28
---	-------------

Reported by husband.....\$7,208.64

Reported by wife..... 7,208.64

Item 15—Taxes

City and County taxes 1940-1941 on home and personal property	\$ 670.79
City and County taxes 1940-1941 on other property.....	96.53
California State Income Tax—1936 additional.....	125.00
1939	2,177.21
	<hr/>
	\$3,069.53

Reported by husband.....\$1,534.77

Reported by wife 1,534.76

Personal Holding Company

L. P. St. Clair owns one-quarter of the stock of the St. Clair Estate Company, 1517-20th Street, Bakersfield, California

[Schedules F, G, H, and I—no data shown]

Schedule J.—Explanation of Credits Claimed in Items 22 and 23.
(See Instructions 22 and 23)

Status	Credit claimed
Married and living with husband or wife—12 months.....	\$2,000.00
Head of family (explain below).....	1,000.00
Less: reported by husband.....	1,000.00

[(2) Credit for Dependents—no data shown]

Schedule K.—Computation of Earned Income Credit. (See Inst. 26)

[(1) If your net income is \$3,000 or less—no data shown]

(2) If your net income is more than \$3,000, use only this
part of schedule

Earned net income (not more than \$14,000).....	\$14,000.00
Net income (item 20, page 1).....	27,916.19
Earned income credit (10% of earned net income or 10% of net income, above, whichever amount is smaller, but do not enter less than \$300).....	1,400.00

Questions

1. State your principal occupation or profession.....
2. Check whether you are a citizen (X) or a resident alien (—).
3. Did you file a return for any prior year? Yes. If so, what was the latest year? 1939. To which Collector's office was it sent? 6th. California.
4. Are items of income or deductions of both husband and wife included in this return? No.
5. State (a) Name of husband or wife if separate return was made
L. P. St. Clair.
(b) Personal exemption, if any, claimed thereon \$1,000.
(c) Collector's office to which it was sent 6th, California.

6. Check whether this return was prepared on the cash (X) or accrual (—) basis.
7. Did you at any time during your taxable year own directly or indirectly any stock of a foreign corporation or a personal holding company as defined by section 501 of the Internal Revenue Code? (Answer "yes" or "no") Yes. (If answer is "yes," attach statement required by Instruction J.)

Affidavit. (See Instruction E)

I/we swear (or affirm) that this return (including any accompanying schedules and statements) has been examined by me/us, and to the best of my/our knowledge and belief is a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued under authority thereof.

Subscribed and sworn to by Annastatia St. Clair before me this..... day of March, 1941.

Affidavit. (See Instruction E)

(If this return was prepared for you by some other person the following affidavit must be executed)

Subscribed and sworn to before me this..... day of March, 1941.

[Balance of affidavits—no data shown]

Exhibit M

Minutes of Meeting of Board of Directors of St. Clair Estate Company Held June 4, 1940

The undersigned being all of the directors of the St. Clair Estate Company hereby consent that a special meeting of the directors of said company be held at 3:00 p.m. of the 4th day of June, 1940, at the office of the company, 1517 20th Street, Bakersfield, California, for the purpose of transacting any and all business affecting the company which may come before the meeting, including the declaration and payment as dividends of earnings of the company for the year 1940 to date, hereby waiving all time, place and purpose of meeting and consenting that said meeting may be held and any business

affecting the company may be transacted thereat whether or not all directors be present.

Dated: June 4, 1940.

/s/ L. P. ST. CLAIR,

/s/ L. W. LOWELL,

/s/ C. S. CURRAN,

/s/ E. S. ST. CLAIR,

/s/ F. C. ST. CLAIR.

Pursuant to the foregoing consent of all the directors, a special meeting of the board of directors of St. Clair Estate Company was held at the time and place specified in said consent.

Present: Directors L. P. St. Clair, E. S. St. Clair and F. C. St. Clair, and L. W. Lowell.

The president, E. S. St. Clair, stated that it is estimated that the net earnings for the company for the year 1940 to date will be slightly in excess of the sum of \$8000.00, and that an order of court had been secured authorizing a dividend distributing said earnings for the calendar year 1940, amounting to the sum of approximately \$8000.00.

A full discussion of said matter followed, whereupon, on motion [134] of director L. P. St. Clair, seconded by director F. C. St. Clair, the following resolution was unanimously adopted:

Whereas, the St. Clair Estate Company commenced proceedings in the year 1938 for the winding up of said corporation; and

Whereas, said winding up and dissolution would have been completed save for the fact that action was instituted in the Superior Court of Kern County, bearing number 33053 by Cora St. Clair as plaintiff against the corporation and its directors, as aforesaid, wherein and whereby the corporation was enjoined and restrained from the payment and distribution of assets and dividends, and

Whereas, such action is contrary to the express wishes of the owners and holders of seventy-five per cent (75%) of the issued capital stock of the St. Clair Estate Company, and

Whereas, it is believed that the St. Clair Estate Company may be held to be a personal holding company within the meaning of the term as set forth in the Revenue Act of 1938 and amendments, and will suffer heavy penalties unless distribution is made of its net income for the year 1940 which to date is estimated to be approximately \$8000.00; and

Whereas, it is the express wish and desire of the St. Clair Estate Company and its directors fully to comply with the provisions of said act and to avoid the imposition of such heavy penalty taxes,

Now, Therefore, Be It Resolved: That a dividend, payable forthwith, of \$6.66-2/3 per share on the outstanding stock of the company and aggregating the sum of \$8000.00 be, and the same is hereby declared to be payable forthwith in the year 1940, as follows:

To Security-First National Bank of Los Angeles, Trustee for Cora St. Clair Cooper.....	\$2,000.00
F. C. St. Clair.....	2,000.00
E. S. St. Clair.....	2,000.00
L. P. St. Clair.....	2,000.00

Resolved Further, that all acts of the officers of the corporation in making expenditures and disbursements, receiving and handling of revenues, the employment of Messrs. Borton, Petrini, Conron & Borton and Hanna and Morton of Los Angeles, California, as attorneys to appear for and on behalf of the corporation, in the place of Andrews and Kline, be and the same are hereby all and singularly approved, ratified and confirmed; and

Be It Hereby Further Resolved that the verified claim of Borton, Petrini, Conron & Borton for the sum of \$500.00, filed in the Matter of the St. Clair Estate Company dissolution proceedings, No. 33107 in the Superior Court of the County of Kern, covering the services of F. E. Borton rendered the corporation in connection with said voluntary dissolution proceedings prior to the institution of court proceedings to supervise said dissolution, be and the same is hereby approved, ratified and confirmed and, subject to the approval of the court, hereby ordered paid.

Upon motion duly made and carried the meeting was adjourned.

.....,

Secretary.

E. S. ST. CLAIR,

President. [136]

Exhibit N

Minutes of Meeting of Board of Directors of
St. Clair Estate Company Held December 11, 1940

The undersigned, being all of the directors of the St. Clair Estate Company, hereby consent that a special meeting of the directors of said company be held at 1:30 p.m. of the 11th day of December, 1940, at the office of the company, 1517 20th Street, Bakersfield, California, for the purpose of transacting any and all business affecting the company which may come before the meeting, including the declaration and payment as dividends of earnings of the company for the year 1940 to date, hereby waiving all notice of time, place and purpose of meeting and consenting that said meeting may be held and any business affecting the company may be transacted thereat whether or not all directors be present.

Dated: December 11, 1940.

/s/ L. P. ST. CLAIR,

/s/ L. W. LOWELL,

/s/ C. S. CURRAN,

/s/ E. S. ST. CLAIR,

/s/ F. C. ST. CLAIR.

Pursuant to the foregoing consent of all the directors, a special meeting of the board of directors of St. Clair Estate Company was held at the time and place specified in said consent.

Present: Directors L. P. St. Clair, E. S. St. Clair, F. C. St. Clair.

The president, E. S. St. Clair, then stated that it is estimated that the net earnings for the company for the year 1940 to date will be in the amount of \$22,000.00; that dividends in the sum total of \$12,000.00 had heretofore been paid to the shareholders of record out of the earnings of the [137] corporation for the present year, 1940, and that an order of court has been secured authorizing and directing a further dividend distribution from said earnings for the calendar year 1940 in the sum of \$10,000.00 in all, which to date is estimated to be approximately \$22,000.00.

A full discussion of said matter followed, whereupon on motion of director...., seconded by director...., the following resolution was unanimously adopted:

Whereas, the St. Clair Estate Company commenced proceedings in the year 1938 for the winding up of said corporation; and

Whereas, said winding up and dissolution would have been completed save for the fact that action was instituted in the superior court of Kern County, bearing number 33053 by Cora St. Clair as plaintiff against the corporation and its directors, as aforesaid, wherein and whereby the corporation was enjoined and restrained from the payment and distribution of assets and dividends; and

Whereas, such action is contrary to the express wishes of the owners and holders of seventy-five

per cent (75%) of the issued capital stock of the St. Clair Estate Company; and

Whereas, it is believed that the St. Clair Estate Company may be held to be a personal holding Company within the meaning of the term as set forth in the Revenue Act of 1938 and amendments, and will suffer heavy penalties unless distribution is made of its net income for the year 1940 which to date is estimated to be approximately \$22,000.00; and

Whereas, it is the express wish and desire of the St. Clair Estate Company and its directors fully to comply with the provisions of said act and to avoid the [138] imposition of such heavy penalty taxes.

Now, Therefore, Be It Resolved; That a dividend, payable forthwith, of \$8.33-1/3 per share on the outstanding stock of the company and aggregating the sum of \$10,000.00 be, and the same is hereby declared to be payable forthwith in the year 1940, as follows:

To Security-First National Bank of Los Angeles,	
Trustee for Cora St. Clair Cooper.....	\$2,500.00
F. C. St. Clair.....	2,500.00
E. S. St. Clair.....	2,500.00
L. P. St. Clair.....	2,500.00

No further business coming before the meeting, upon motion duly made and carried the meeting was adjourned.

F. C. ST. CLAIR,
Secretary.

E. S. ST. CLAIR,
President. [139]

Exhibit O

Minutes of Meeting of Board of Directors of
St. Clair Estate Company Held December 26, 1940

The undersigned, being all of the directors of the St. Clair Estate Company, hereby consent that a special meeting of the directors of said company be held at 4:00 p.m. of the 26th day of December, 1940, at the office of the company, 1517 20th Street, Bakersfield, California, for the purpose of transacting any and all business affecting the company which may come before the meeting, including the declaration and payment as dividends of earnings of the company for the year 1940 to date, hereby waiving all notice of time, place and purpose of meeting and consenting that said meeting may be held and any business affecting the company may be transacted thereat whether or not all directors be present.

Dated: December 26, 1940.

/s/ L. P. ST. CLAIR,

/s/ L. W. LOWELL,

/s/ C. S. CURRAN,

/s/ E. S. ST. CLAIR,

/s/ F. C. ST. CLAIR.

Pursuant to the foregoing consent of all the directors, a special meeting of the board of directors of St. Clair Estate Company was held at the principal office of the corporation, 1517 20th Street, Bak-

ersfield, California, on December 26, 1940, at the hour of 4:00 p.m. of said day.

Present: Directors L. W. Lowell, C. S. Curran, E. S. St. Clair and F. C. St. Clair. [140]

President E. S. St. Clair presiding and the following business was transacted: The President stated that further and additional income had accrued to the corporation in the sum of \$4,000.00; that said income had not been considered in determining the income of this corporation as referred to in the minutes of the last preceding meeting of this Board of Directors; and the President further stated that it was proper and to the best interests of this corporation and its shareholders that a dividend be declared on the outstanding shares of the capital stock of this corporation and that said further income, to wit, the sum of \$4,000.00 be distributed to the shareholders of this corporation entitled to receive dividends, and that an order has been issued out of the Superior Court of the State of California in and for the County of Kern authorizing and directing a dividend payment equivalent to said sum.

A Full discussion of the said matter followed, whereupon on motion of director...., seconded by director...., the following resolution was unanimously adopted:

Whereas, this corporation has received further and additional income in the sum of \$4,000.00; and

Whereas, it is to the best interests of this corporation and its shareholders that said income be dis-

tributed as dividends to the shareholders of this corporation entitled thereto; and

Whereas, an order has been issued out of the Superior Court of the State of California in and for the County of Kern, authorizing and ordering a dividend payment equivalent to said sum;

Now, Therefore, Be It Resolved: That a dividend of \$3.33-1/3 per share be, and the same is hereby declared to be immediately payable on the outstanding shares of the capital stock of this corporation to those shareholders of record as of the date hereof. [141]

No further business coming before the meeting, upon motion duly made, seconded and carried, the meeting was adjourned.

F. C. ST. CLAIR,
Secretary.

E. S. ST. CLAIR,
President. [142]

Exhibit P

In the Superior Court of the State of California,
in and for the County of Kern

No. 33107

In the Matter of
St. Clair Estate Company, a Corporation

It is hereby stipulated that the hearings on the Motions now calendared for June 6, 1940, at 10 A. M. be and the same may be continued until July 16, 1940, at 10 A. M., and it is hereby further stipu-

lated that the above entitled Court may forthwith order and direct the payment of a dividend to the shareholders of record of said corporation as of June 4, 1940, of the sum of 6.66c per share, out of the earnings of 1940.

ANDREWS & KLINE,
BORTON, PETRINI, CONRON
& BORTON,

By /s/ HARRY M. CONRON,
Attorneys for St. Clair Estate Company, L. P., E. S.
and F. C. St. Clair.

WARREN E. LIBBY,
OSBORN, BURUM &
SHORTRIDGE,

By /s/ JOHN SHORTRIDGE,
Attorneys for Petitioner Cora M. St. Clair, Security-
First National Bank of Los Angeles, and Leon-
ard St. Clair.

It is so ordered in accordance with the above stipulation.

Dated: June 4th, 1940.

[Seal] /s/ WARREN STOCKTON,
Judge of the Superior Court.

[Endorsed]: Filed June 4, 1940, Superior Court.

Exhibit Q

Minutes Superior Court, Dept. 1, No. 127

Thursday, October 3, 1940

Court met at 1:00 P. M.

Present: Hon. H. S. Gans, Judge
W. V. Freeman, Deputy Clerk
Al Renfro, Bailiff
Roy Davis, Reporter

No. 33107

In the Matter of
St. Clair Estate Company, a Corporation,
In the Process of Voluntary Winding Up

The above entitled matter came on regularly at this time today for hearing upon Fifth Petition for Partial Distribution of assets and Petition for Distribution of Dividends, with the petitioners appearing by their counsel Warren E. Libby, R. Y. Burum and John Shortridge, and St. Clair Estate Company appearing by their counsel Harry M. Conron and Jim McRoberts, present in open Court.

Upon oral stipulation by and between counsel for respective parties in open Court, it is by the Court Ordered that a dividend in the sum of Four Thousand Dollars (\$4,000.00) be paid forthwith out of the St. Clair Estate Company income on hand, in accordance with the written decree to be prepared and signed by the Court.

It is further by the Court Ordered that the above entitled matter be, and the same is hereby trans-

ferred to Department 2 of this Court for further hearing.

R. J. VEON,
County Clerk and Ex-Officio
Clerk Superior Court. [144]

State of California
County of Kern—ss.

I, R. J. Veon, County Clerk and ex-officio Clerk of the Superior Court, do hereby certify the foregoing to be a full, true and correct copy of the original Minute Order on file in my office and that I have carefully compared the same with the original.

Witness my hand seal of the Superior Court this 9th day of February, 1945.

[Seal] R. J. VEON,
County Clerk and Ex-Officio
Clerk, Superior Court.

By L. REAGAN,
Deputy Clerk. [145]

Exhibit R

In the Superior Court of the State of California,
in and for the County of Kern

No. 33107

In the Matter of
St. Clair Estate Company, a Corporation,
In the Process of Voluntary Winding Up

It Is Hereby Stipulated That the above court may forthwith order and direct the payment of a dividend to the shareholders of record of the St. Clair Estate Company, a corporation, as of December 12, 1940, of the sum of \$3.88 $\frac{1}{3}$ c per share, totaling \$10,000.00, in all, said dividend to be paid out of the earnings of the above corporation for the year 1940 solely.

BORTON, PETRINI, CONRON
& BORTON,

HANNA AND MORTON

By /s/ JAMES M. McROBERTS,
Attorneys for St. Clair Estate Company, L. P., E. S.
and F. C. St. Clair.

WARREN E. LIBBY,
OSBORN, BURUM &
SHORTRIDGE,

By /s/ WARREN E. LIBBY,
Attorneys for Petitioner Cora M. St. Clair, Security-
First National Bank of Los Angeles, and Leon-
ard St. Clair.

Payment of the foregoing dividend is ordered in accordance with the terms and provisions of the within stipulation.

Dated: December 11, 1940.

[Seal] /s/ [Illegible]

Judge of the Superior Court.

[Endorsed]: Filed Dec. 11, 1940, Superior Court.

Exhibit S

In the Superior Court of the State of California,
in and for the County of Kern

No. 33107

In the Matter of

St. Clair Estate Company, a Corporation,

In the Process of Voluntary Winding Up

STIPULATION

It appearing that the St. Clair Estate Company has received further and additional income in the sum of \$4,000.00, and that such sum should properly be distributed to the shareholders of said corporation entitled thereto;

It Is Stipulated that the said St. Clair Estate Company shall forthwith pay a further dividend on the outstanding shares of the capital stock of said St. Clair Estate Company in the sum of \$3.33 $\frac{1}{3}$ per share, payable solely out of and from income that has accrued to the said corporation for the

calendar year 1940 and that is now available for said purpose.

Dated: December 26, 1940.

WARREN E. LIBBY AND
OSBORN, BURUM &
SHORTRIDGE,

By /s/ R. Y. BURUM,
Attorneys for Petitioners.

HANNA AND MORTON,
BORTON, PETRINI, CONRON
BORTON,

By /s/ HARRY M. CONRON,
Attorneys for St. Clair Estate
Company, et al.

It Is So Ordered.

[Seal] /s/ WARREN STOCKTON,
Judge.

[Endorsed]: Filed Dec. 26, 1940, Superior Court.

Exhibit U

In the Superior Court of the State of California,
in and for the County of Kern

No. 33107

In the Matter of
St. Clair Estate Company, a Corporation,
In the Process of Voluntary Winding Up

ORDER

The Petition of St. Clair Estate Company, a corporation, for Order Distributing Assets of Corporation in Final Liquidation having come on regularly for hearing in Department 2 of the above entitled Court on the 27th day of December, 1948, the Honorable Robert B. Lambert, Judge Presiding, Messrs. Hanna and Morton, Borton, Petrini, Conron and Borton, by James M. McRoberts, appearing for the Petitioner, and no counsel appearing for any stockholder; and it further appearing that notice of said hearing had been duly given to all stockholders within the time and in the manner prescribed by law; and the Court being fully advised,

It Is Ordered, Adjudged and Decreed that the Petition for Order Distributing Assets of Corporation in Final Liquidation, filed herein by the above named corporation, to wit: St. Clair Estate Company, a corporation, and the plan of distribution of assets [170] to the corporation's stockholders in final liquidation be and the same hereby are approved.

It Is Further Ordered, Adjudged and Decreed that said corporation shall, not later than December 31, 1948, sell, transfer, assign and set over to L. P. St. Clair, F. C. St. Clair, E. S. St. Clair, and to Security-First National Bank of Los Angeles, Trustee (under its private trust No. 70-217 for Cora St. Clair, sometimes referred to as Cora St. Clair Cooper), and each of them, from earnings and surplus, not less than \$26,000.00, cash, or book value of other assets hereinbelow listed, and between March 5, 1949, and April 5, 1949, said corporation shall distribute \$36,500.00, cash, or book value of other assets hereinbelow listed as a deficiency dividend for the calendar year 1938, pursuant to Section 506(c) of the Internal Revenue Code; and it appearing that an examination of the corporation's federal income and personal holding company returns for the years 1941 to 1947, inclusive, has been made but no report thereof has yet been served on this corporation, and that as a consequence thereof there may be a liability for federal personal holding company surtax for said years which can be avoided in whole or in part by properly scheduled distributions of the remaining assets of the corporation.

It Is Further Ordered, Adjudged and Decreed that if after receipt by this corporation of the report of said examination it is finally determined that there is no deficiency of federal personal holding company surtax, then all of the assets remaining after the distributions hereinabove ordered shall be distributed to the shareholders forthwith. However, if after receipt of the report of said federal

revenue agent's examination it is finally determined that a deficiency of federal personal holding company surtax is proposed for any of said years, 1941 to 1947, inclusive, [171] then it is ordered, adjudged and decreed that the assets remaining after the distributions hereinabove ordered shall be distributed at such times and in such amounts as may be necessary to qualify said distributions as deficiency dividends within the meaning of Section 506(c) of the Internal Revenue Code.

The following described cash, securities, oil leases, real estate or interest in leases or real estate, mining deeds, or mineral rights shall be distributed as hereinabove ordered and with the divisions hereinafter specified, to wit:

1. From the cash on hand after payment of all obligations, there should be paid to L. P. St. Clair, E. S. St. Clair, and to F. C. St. Clair, each, the sum of \$4,500.00, and thereafter all cash shall be distributed in four equal parts to L. P. St. Clair, E. S. St. Clair, F. C. St. Clair, and to Security-First National Bank of Los Angeles, Trustee.

2. 200 shares of common stock of Bakersfield Laundry Association, one-fourth to be distributed to each of the four stockholders.

3. 93.46 shares of common stock of Bakersfield Sandstone Brick Company, one-fourth to be distributed to each of the four stockholders.

4. 700 shares of common stock of Bank of America, one-fourth to be distributed to each of the four stockholders.

5. 250 shares of 7% cumulative preferred stock of Sun Maid Raisin Growers Association, to be distributed one-fourth to each of the four stockholders.

6. 45 shares of common stock of San Joaquin Cotton Compress and Warehouse, to be distributed one-fourth to each of the four stockholders.

7. 1,025 shares Class A preferred stock of Bakersfield B.P.O.E., to be distributed one-fourth to each of the four stockholders. [172]

8. 6,931 shares of common capital stock of Union Oil Company and Union Oil Associates, being 1,165 and 5,766 shares, respectively, to be distributed one-fourth to each of the four stockholders.

9. 2,200 shares of Shell Union Oil Company stock, to be distributed one-fourth to each of the four stockholders.

10. 356 shares of 6% preferred stock of Southern California Gas Company stock, to be distributed one-fourth to each of the four stockholders.

11. 100 acres in the South Belridge Oil District, Kern County, California, now under lease to General Petroleum Corporation for oil and gas development, the title to said real property, together with Lessor's interest to the said oil and gas lease, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders. Said real estate is described as follows:

East one-half (E $\frac{1}{2}$) of the East one-half (E $\frac{1}{2}$) of the Northeast one-quarter (NE $\frac{1}{4}$) Section 2—

Township 29, Range 21 East, M.D.B. & M., together with the West sixty (W 60) acres of the Northwest quarter (NW $\frac{1}{4}$)—Section 1—Township 29, Range 21 East, M.D.B. & M.

12. 480 acres, more or less, in Section 20, Township 28, Range 24 East, M.D.B. & M., to be distributed to the four stockholders on the basis of an undivided one-fourth interest each.

13. A one-eighth interest in 70 acres, including mineral rights, located in Section 6, Township 11, Range 23 East, M.D.B. & M., more particularly described as follows:

South one-half (S $\frac{1}{2}$) of the Northeast quarter (NE $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$)—the Northwest quarter (NW $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$)—the South 466.7 feet of the West 466.7 feet of the Southeast quarter (SE $\frac{1}{4}$) of the Northeast quarter (NE $\frac{1}{4}$)—the [173] North 467.3 feet of the West 467.3 feet of the Southeast quarter (SE $\frac{1}{4}$) of the Southeast quarter (SE $\frac{1}{4}$) Section 6—Township 11, Range 23 East, M.D.B. & M., to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

14. An interest in Lot 5, Gardena Tract, Los Angeles County, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

15. A one-half interest in the mining rights under a 100-acre parcel in Section 28, Township 30 South, Range 27 East, M.D.B. & M., heretofore sold by the corporation with a reservation of such fifty

per cent of all oil or mineral rights, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

16. An undivided ten-twenty-fourths interest in the Wilkinson Placer Claim, Lowell Hill Mining District, Nevada County, California, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

17. An undivided five-ninths interest in the Wildcat Placer Claim, Lowell Hill Mining District, Nevada County, California, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

18. An undivided one-fourth interest to each of the four stockholders in the Live Oak Placer Claim, being a fraction of Lot 52, Section 35, Township 16, Range 10 East.

19. A receivable from Cora St. Clair and Leonard St. Clair amounting to \$13,700.00, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

20. A judgment against Cora St. Clair Cooper purchased by the corporation for \$2,764.35, being the judgment recovered in a certain action in the superior Court of the State of [174] California, in and for the County of Alameda, entitled Frank Mitchell, Jr., v. Cora St. Clair Cooper, etc., No. 47335, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

21. Note of Cora St. Clair Cooper in the principal sum of \$2,750.00, to be distributed on the basis of an undivided one-fourth interest to each of the four stockholders.

22. An undivided one-fourth interest to each of the four stockholders in a claim for refund after the collection thereof of federal personal holding company surtax in the principal sum of \$8,318.77, representing the sum paid by the corporation to the Collector of Internal Revenue as and for a deficiency of personal holding company surtax for the year 1938.

23. All the rest, residue and remainder of all the assets of St. Clair Estate Company, now known or hereafter discovered is hereby ordered distributed, and is hereby distributed, an undivided one-fourth to each of the following: L. P. St. Clair, F. C. St. Clair, E. S. St. Clair, and Security-First National Bank of Los Angeles, Trustee (under its private trust No. 70-217) for Cora St. Clair, sometimes referred to as Cora St. Clair Cooper.

Dated: December 30, 1948.

[Seal] /s/ R. B. LAMBERT,
Judge.

[Endorsed]: Filed Dec. 30, 1948, Superior Court.

Exhibit V

	Date of Dis- tribution	Value on Date of Dis- tribution
(1) (a) \$4,500 cash to each :		
L. P. St. Clair.....	8-12-49	4,500.00
E. S. St. Clair.....	8-12-49	4,500.00
F. C. St. Clair.....	8-12-49	4,500.00
(b) Bal. of cash equally to :		
	12-31-48 3-28-49 11-21-49	
L. P. St. Clair.....	2,500.00 2,500.00 5,000.00	10,000.00
E. S. St. Clair.....	2,500.00 2,500.00 5,000.00	10,000.00
F. C. St. Clair.....	2,500.00 2,500.00 5,000.00	10,000.00
Sec. 1st Natl. Bk.....	2,500.00 2,500.00 5,000.00	10,000.00
(2) 200 sh. Bakersfield Laundry Assn.....	12-31-48	50,000.00
(3) 93.46 sh. Bakersfield Sandstone Brick		
@ \$200 ea.....	8-12-49	18,692.00
(4) 700 sh. Bank of America @ \$42½.....	8-12-49	29,750.00
(5) 5 sh. Sunmaid Raisin Pfd.....	9-29-49	—0—
(6) 45 sh. San Joaquin Cotton Compress		
@ \$170 ea.....	8-22-49	7,850.00
(7) 1025 sh. Bakersfield BPOE.....	8-22-49	256.00
(8) 6931 sh. Union Oil Co. @ \$29¾ each.....	9-29-49	206,197.25
(9) 2200 sh. Shell Union Oil Co. @ \$35⅝ ea.....	4-15-49	78,375.00
(10) 356 sh. Southern Calif. Gas Pfd. @ \$35¼ ea.....	8-12-49	12,549.00
(11) (a) Fee of 100 acres being E½ of the E½ of the NE¼, Sec. 2, T 29, R 21 E, etc.		
@ \$35/acre	9-29-49	3,500.00
(b) Lease to General Petroleum covering (a)		10,200.00
(12) 480 acres Sec. 20, T 28, R 24 E.....	9-29-49	4,800.00
(13) ⅛ int. in 70 acres, being S½, NE¼, SE¼, NW of SW¼ in Sec. 6, T 11, R 23 E.....	9-29-49	2,500.00
(14) Lot 5 of the Gardena Tract.....	8-22-49	500.00
(15) One-half int. in mineral rights of 100 acre parcel.....	8-22-49	500.00
(16) Wilkinson Placer Claim.....	9-29-49	—0—
(17) Wildeat Placer Claim.....	9-29-49	—0—
(18) Live Oak Placer Claim.....	9-29-49	—0—
(19) Receivable from Cora St. Clair and Leonard St. Clair of \$13,700.00.....	8-22-49	—0—
(20) Judgment against Cora St. Clair for \$2,764.35	8-22-49	—0—
(21) Note of Cora St. Clair for \$2,750.00.....	8-22-49	—0—
(22) See cash above.		
(23) Rest, residue and remainder mineral interest on 80 acres.....	9-29-49	500.00
Total.....		\$479,669.2

Exhibit W

Minutes of Meeting of Shareholders of St. Clair
Estate Company

(Held December 23, 1938)

Pursuant to call by the President, and to written notice given to and served upon each of the stockholders in all respects as required by law, and by the By-laws of the Company, a meeting of the stockholders of St. Clair Estate Company was held at the office of the Company, 1517 20th Street, in the City of Bakersfield, Kern County, California, on Friday, December 23rd, 1938, at 10 o'clock a.m.

The meeting was called to order by the President, E. S. St. Clair, who stated the purpose of the meeting as set forth in the notice thereof given to the stockholders.

The Secretary reported that notice had been personally served upon each of the stockholders of the company within the time and in the manner as provided by the By-laws of the Company.

There were present at the meeting in person:

E. S. St. Clair, holding 300 shares;

E. C. St. Clair, holding 300 shares;

L. P. St. Clair, holding 60 shares;

There were represented at the meeting by proxy:

L. A. Church & Company, a co-partnership, as
pledgee of L. P. St. Clair, by proxy in favor of
L. P. St. Clair, representing 240 shares;

..... by proxy in favor of
..... representing shares.

Total represented in person 660 shares;

Total represented by proxy 240 shares;

Total amount of stock represented at the meeting 900 shares. [177]

The President thereupon reported that 900 shares, being more than a majority of all of the subscribed, issued or outstanding shares of stock of the company, were represented at the meeting, and the meeting was competent for the transaction of the business for which it had been called.

The President reported that an examination of the books and records of the St. Clair Estate Company had been made by Haskins & Sells, Certified Public Accountants, and presented to the meeting of the stockholders, financial statements and reports prepared by said Accountants covering in particular the period from February 1, 1929, up to and including December 6, 1938, and certain matters of interest prior thereto.

The President also reported that the said financial statements and reports prepared by said Accounts had at the meeting of directors held immediately preceding this meeting of stockholders, been considered and approved by resolution of the directors, and further, that the acts of the officers in connection with the transactions shown in said financial statements and reports prepared by said Accountants, had all and singular been ratified, confirmed and approved by resolution of the Board of Directors, and presented to the stockholders the minutes

of the meeting of the board of directors held immediately preceding this meeting of stockholders.

Thereupon the stockholders made examination of said financial statements and reports, and also of the minutes of the meeting of the Board of Directors held at the office of the company on December 23, 1938, immediately preceding this meeting of stockholders.

Whereupon, on motion of L. P. St. Clair seconded by F. C. St. Clair and unanimously adopted, it was resolved that said financial statements and reports prepared by the accountants be in all respects approved and confirmed, and further, that the acts of the officers of the company, and of the directors as set forth in said financial statements and said report, and as set forth in the minutes of said meeting of the Board of Directors held immediately preceding this meeting of stockholders, be all and singular thereof hereby ratified, confirmed and approved.

The President reported that there had been filed with the corporation [178] the written assent of the shareholders of said corporation representing a majority of the voting power thereof amending Article I of the By-laws of St. Clair Estate Company, by deleting therefrom the words "who shall be stockholders holding one or more shares of stock in their own names upon the books of the corporation."

Whereupon, upon motion of F. C. St. Clair seconded by L. P. St. Clair and unanimously adopted

it was resolved that in pursuance of said written assent of shareholders Article I of the By-laws of St. Clair Estate Company upon said amendment shall be as follows:

“Article I. Corporate Powers: The Corporate powers of this corporation shall be vested in a board of five (5) directors, and three (3) shall constitute a quorum for the transaction of business.”

The President stated that one of the purposes for which the meeting was called was the election of a board of five (5) directors, to hold office until the next annual meeting, and until their successors, respectively, shall be elected and qualified.

The President called for nominations for the office of director. Thereupon E. S. St. Clair, F. C. St. Clair, L. W. Lowell, C. S. Curran and L. P. St. Clair were presented in nomination for the offices of directors of St. Clair Estate Company.

There being no other nominations, on motion seconded and unanimously carried, the nominations were closed and the Secretary was instructed to cast the ballot of, and on behalf of, all stock represented at the meeting, for and in favor of the election of said nominees as directors of St. Clair Estate Company.

Thereupon the Secretary cast the ballot and announced that the unanimous ballot representing 900 shares of the capital stock of St. Clair Estate Company, out of a total of 1200 shares of issued and outstanding stock of said company, being more than a majority thereof, had been cast for and in favor

of E. S. St. Clair, F. C. St. Clair, L. W. Lowell, C. S. Curran and L. P. St. Clair, as directors. [179]

The President thereupon declared that said last named persons had been duly elected directors of St. Clair Estate Company.

L. P. St. Clair, a stockholder of St. Clair Estate Company, presented the following resolutions and moved their adoption, to wit:

“Whereas, it is deemed advisable and for the best interests of the shareholders of St. Clair Estate Company that it wind up its affairs and voluntarily dissolve,

“Now, Therefore, Be It Resolved, that this corporation and its shareholders, representing more than a majority of the voting power of said corporation, hereby elect to wind up the affairs of the corporation and voluntarily dissolve.

“Resolved, Further, that the officers or directors of this corporation be and they hereby are authorized and directed to file the certificate and give the written notice required by Sections 400 and 400a, respectively, of the Civil Code of California;

“Resolved, Further, that the officers and directors of this corporation be, and they hereby are authorized and directed to take such further action, steps and proceedings as may be necessary or as they deem desirable, to wind up the affairs of this corporation and to dissolve it, and to equitably and ratably distribute its net assets among its stockholders, and may institute in the name of the corporation, or otherwise, such legal proceedings as

they may deem advisable in connection with such dissolution proceedings, and may employ attorneys and incur expenses in connection therewith.

“Resolved, Further, that this corporation cease to carry on business except to such extent as may be necessary for the beneficial winding up thereof.”

The motion for the adoption of said resolutions was seconded by F. C. St. Clair, a stockholder, and being put to a vote the same were adopted by the affirmative vote of 900 shares (out of a total of 1200 shares of the [180] issued stock and outstanding stock of said company), being and representing more than a majority of the total voting power of said corporation.

The President reported that there had been filed with the corporation written consent of shareholders of St. Clair Estate Company to voluntarily dissolve, which written consent was signed by shareholders constituting in the aggregate the shareholders of said corporation representing a majority of the voting power thereof.

F. C. St. Clair, a stockholder of St. Clair Estate Company, presented the following resolutions and moved their adoption, to wit:

“Whereas, the President has reported that except for minor current accounts payable not to exceed the sum of One Hundred Dollars (\$100.00) and the action pending in the Superior Court of the State of California (Los Angeles County No. 425-810), in which Cora St. Clair is plaintiff and St. Clair Estate Company, et al., defendants, in which action

the sum of \$4,500.00 is in issue, the corporation has no known debts or liabilities, and

Whereas, the corporation desires, after adequately providing for all possible debts and liabilities, to distribute all the remaining corporate assets among the shareholders in accordance with their respective rights,

Now, Therefore, Be It Resolved, that the following plan of distribution of the assets of the company between and among the stockholders be adopted:

(1) All assets of the company of every kind and character available for distribution be distributed between and among the stockholders of the corporation—

(a) All of said assets, except the sum of \$5,000.00 (of the earned surplus of the company), shall forthwith be distributed to stockholders as their respective interests may appear.

(b) The sum of \$5,000.00 of the earned surplus of the [181] company (in cash or securities having a current market value in said sum) shall be temporarily retained for the purpose of providing for the payment of costs and expenses of liquidation and dissolution, and any other debts or liabilities of the company, and also for costs and attorneys fees incurred in connection with any litigation instituted against the company. Forthwith upon the liquidation of all debts and liabilities of the corporation the said sum or residue thereof, shall be equally and ratably distributed among the stockholders of the company.

(2) Shares, obligations, or securities of any other corporation shall be equally and ratably distributed between and among the stockholders of the company.

(3) Notes payable of Cora St. Clair (Cooper) to the company, aggregating \$2,750.00, shall be distributed to Security-First National Bank of Los Angeles, as Trustee for Cora St. Clair (Cooper) under Trust No. 70-217, as a portion of its distributive share as such trustee.

(4) Real property, leases, placer or mining claims, by good and sufficient instruments of conveyance, shall be conveyed by the corporation to the stockholders, vesting title in the stockholders as tenants in common, as follows:

E. S. St. Clair, undivided $\frac{1}{4}$ interest;

F. C. St. Clair, undivided $\frac{1}{4}$ interest;

Security-First National Bank of Los Angeles, as Trustee for Cora St. Clair (Cooper) under Trust No. 70-217 undivided $\frac{1}{4}$ interest;

L. A. Church & Company, a co-partnership, as pledgee for L. P. St. Clair undivided $\frac{1}{5}$ interest;

L. P. St. Clair undivided $\frac{1}{20}$ interest;

such conveyance to be subject to encumbrances, conditions, restrictions and covenants of record, taxes for fiscal year 1938-39;

(5) The President, or Vice-President and Secretary of this [182] corporation are hereby authorized to execute and deliver on behalf of this corporation and in its name, instruments of conveyance to said stockholders, in conformity herewith.

(6) Distribution hereunder is in complete satisfaction of the rights of all stockholders and upon such distribution all certificates of stock standing in the names of the stockholders shall be delivered to the corporation and cancelled.

The motion for the adoption of said resolutions was seconded by L. P. St. Clair a stockholder and being put to a vote the same was adopted by the affirmative vote of 900 shares (out of a total of 1200 shares of the issued and outstanding stock of the Company) being and representing more than two-thirds of the shares of stock of said corporation.

On motion duly seconded and unanimously carried the meeting was adjourned to and until, and to reconvene at one o'clock p.m., of Wednesday, the 28th day of December, 1938, at the office of the company, 1517 20th Street, in the City of Bakersfield, California.

F. C. ST. CLAIR,
Secretary of St. Clair Estate
Company.

E. S. ST. CLAIR,
Secretary of St. Clair Estate
Company.

[Endorsed]: Filed March 28, 1950.

PLAINTIFF'S EXHIBIT No. 2

In the United States District Court for the Southern
District of California, Central Division

No. 9711-Y Civil

L. P. ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

No. 9712-Y Civil

ANNASTATIA ST. CLAIR,

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant.

SUPPLEMENTAL STIPULATION OF FACTS

I.

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective counsel, that the fair market value of distributions made by the St. Clair Estate Company to the plaintiffs herein, as shareholders of said corporation during the years 1939 and 1940, did not exceed their basis for computing gain on said stock.

II.

It Is Hereby Stipulated by and between the parties hereto that the following facts may be

taken to be true, subject to the right [184] of either party to object to the materiality, relevancy or competency of any of the matters set forth herein and subject to the further right of any party to explain, amplify or controvert any of the matters set forth herein:

1. That on or about February 1, 1949, Everett S. St. Clair filed with the Collector of Internal Revenue at Los Angeles, California, a claim for refund of federal income taxes for the calendar year 1946; a copy of such claim is attached hereto, marked Exhibit "X," and by this reference made a part hereof;

2. That thereafter, on or about October 21, 1949, the Commissioner of Internal Revenue scheduled the refund claimed in said claim for overassessment and on or about November 8, 1949, refunded and paid to said Everett S. St. Clair the tax demanded by him in the claim for refund aforesaid;

3. The stockholders of the St. Clair Estate Company did not surrender any of their certificates of stock in said corporation during the years 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, and 1949, and the corporation did not, during those years, cancel any certificates or shares of its stock.

Dated: This 5th day of May, 1950.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorneys for Plaintiffs.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ EDWARD R. McHALE,
Attorneys for Defendant.

Exhibit X

Claim

To Be Filed With the Collector Where Assessment
Was Made or Tax Paid

Collector's Stamp; Blank.

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse.

- ☒ Refund of Taxes Illegally, Erroneously, or Excessively Collected.
- ☐ Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate, gift, or income taxes).

State of California,
County of Kern—ss.

Name of taxpayer or purchaser of stamps: E. S.
St. Clair.

Business address: 505 - 19th Street, Bakersfield,
California.

Residence: 1517 - 20th Street, Bakersfield, Cali-
fornia.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on
behalf of the taxpayer named, and that the facts
given below are true and complete:

1. District in which return (if any) was filed: 6th
Calif.
2. Period (if for tax reported on annual basis,
prepare separate form for each taxable year)
from: 1-1, 1946, to 12-31, 1946.
3. Character of assessment or tax: Income.
4. Amount of assessment, \$1,397.34; dates of pay-
ment: 3-15-46; 6-15-46; 9-15-46; 1-14-47.
5. Date stamps were purchased from the Govern-
ment: Blank.
6. Amount to be refunded: \$1,529.76.
7. Amount to be abated (not applicable to income,
gift, or estate taxes): Blank.
8. The time within which this claim may be legally
filed expires, under section of
(Revenue Act or Internal Revenue Code) on
....., 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

See Statement Attached

/s/ E. S. ST. CLAIR.

Subscribed and sworn to before me this 29th day of January, 1949.

[Seal] /s/ CHARLES H. HARE,
Notary Public.

Reverse: Blank. [186]

Statement

I.

On or before the time provided by law taxpayer filed his income tax return for the calendar year 1946 showing a tax thereon of \$1,397.34 which was, at the time of filing said return, paid to the Collector of Internal Revenue for the 6th Collection District of California.

II.

In reporting his net income for said year taxpayer erroneously reported as a dividend the sum of \$6,000.00 received as a distribution on stock which taxpayer held in the St. Clair Estate Company. In fact, said distribution constituted a return of capital which should have been applied by taxpayer against and in reduction of the base of his stock, for on December 23, 1938, the St. Clair Estate Company adopted and approved a plan of complete

liquidation and dissolution, and the distribution aforesaid was made pursuant to said plan as one of a series of similar distributions in final and complete liquidation of said corporation and in redemption of its outstanding stock. That said corporation was then in a status of liquidation and has continued in that status since is a fact of judicial record established by decision of the United States Tax Court in *St. Clair Estate Company v. Commissioner of Internal Revenue*, 9 T.C. 392. It follows, therefore, that said distribution constituted a return of capital to taxpayer (*Florence M. Quinn*, 35 B.T.A. 412) and should have been applied against and in reduction of the basis of taxpayer's stock since that and other similar distributions did not exceed the base thereof (Regs. 111, Section 29.115-5).

III.

Taxpayer is entitled to and hereby makes claim for refund of the sum of \$1,529.76 tax overpaid by reason of erroneously including said distribution in taxable income. The following computation eliminating said distribution properly reflects the overpayment of tax and indicates the amount to which taxpayer is entitled as a refund: [188]

1. Adjusted gross income per return.....	\$9,816.64
2. Less distributions from St. Clair Estate Co.	6,000.00
	<hr/>
3. Revised adjusted gross income.....	3,816.64
	<hr/>

4.	Tax on (1) above.....	1,997.34
5.	Tax on (3) above computed below (7)	467.58
6.	Tax to be refunded.....	1,529.76
7.	Computation of tax on (3)	
	(a) Adjusted gross income revised..	3,816.64
	(b) Less deductions itemized on re- turn	897.58
	(c) Net income.....	2,919.06
	(d) Less personal exemption.....	500.00
		2,419.06
	(e) Tentative normal and surtax....	492.19
	(f) Less 5% of (e).....	24.61
	(g) Combined normal and surtax....	467.58

IV.

Claimant requests and demands such further or additional refund or refunds as may now or hereafter appear to be due it by reason of the foregoing or on account of (a) any mistake in fact or in law made by itself or any officer, clerk or other employee of the United States Treasury Department in the preparation, amendment and/or adjustment of its said return, (b) any mistake in the payment and/or collection of the tax made by any person designated in subdivision (a) of this paragraph, (c) any erroneous or illegal requirement or regulation of any officer, clerk or other employee

of the United States Treasury Department, (d) any repealed law, whether heretofore or hereafter repealed, (e) any unconstitutional law, whether heretofore or hereafter declared unconstitutional, or (f) any other act or matter in connection with the said return, whether covered by the foregoing or not so covered.

[Endorsed]: Filed May 5, 1950. [189]

DEFENDANT'S EXHIBIT A

United States of America—Treasury Department—Washington

(Date) October 21, 1949.

To All To Whom These Presents Shall Come, Greeting:

I certify that the annexed is a true copy of Claim for Refund of \$1,138.49, Income Tax for 1940, filed by Annastatia St. Clair, Los Angeles, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury:

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division, Income Tax Unit,
Bureau of Internal Revenue.

Claim

To be filed with the Collector where assessment was made or tax paid

[Stamped]: 2764643

[Stamped]: Received July 14, 1943, Claims Control Section

[Stamped]: Received, Revenue Agent in Charge, Los Angeles Division,
July 30, 1943

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amt. Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp: Received Mar. 6, 1943, Coll. Int. Rev., Los Angeles, Cal.

State of California,

County of Los Angeles—ss: 204490—1941 List.

Name of taxpayer or purchaser of stamps: Anastatia St. Clair.

Business address: 210 South Occidental, Los Angeles, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Sixth California.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1940, to December 31, 1940.
3. Character of assessment or tax Income tax.
4. Amount of assessment, \$5,209.06; dates of payment Quarterly in 1941.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded.....\$1,138.49.
7. Amount to be abated (not applicable to income or estate taxes).....
8. The time within which this claim may be legally filed expires, under Section 322 of the Internal Revenue Code, on March 15, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

This claim is based upon the exclusion from gross income of one half of the amount of \$6,500.00, as community income, received by deponent's husband from St. Clair Estate Company during the taxable year and reported as a taxable dividend. In the case of that corporation, relative to its personal holding company surtax liability for the calendar year 1940, now pending before the Tax Court of the United States, B. T. A. Docket No. 109162, the issue is whether distributions made by said corporation during the taxable year were distributions in liquidation chargeable to capital or distributions chargeable to earnings and profits.

This claim is being filed to protect the taxpayer's interests in the event it should be finally decided that said distributions are chargeable to capital.

Signed ANNASTATIA ST. CLAIR.

Sworn to and subscribed before me this 24th day of Feb., 1943.

/s/ A. M. CHASE.

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column).

Period	Assess. List	Year	Acet. No.	Amount Assessed	Paid, Abated, or Credited Date	Amount
1940	IT	1941	204490	\$5,209.06	3/15/41	\$1,302.27 Pd.
					6/13/41	1,302.26 Pd.
					9/15/41	1,302.27 Pd.
					12/15/41	1,302.26 Pd.
				Total, \$5,209.06	Total, \$5,209.06	

[Stamped] : I. T. Schedule 33961 Rejected

HARRY C. WESTOVER, Collector of Internal Revenue,
(District) 6th Calif. smd.

Admitted in evidence May 8, 1950.

DEFENDANT'S EXHIBIT B

United States of America—Treasury Department—Washington

(Date) October 21, 1949.

To All To Whom These Presents Shall Come, Greeting :

I certify that the annexed is a true copy of Claim for Refund of \$1,296.13, Income Tax for 1939, filed by Annastatia St. Clair, Los Angeles, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury :

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division, Income Tax Unit,
Bureau of Internal Revenue.

Claim

To be filed with the Collector where assessment was made or tax paid

[Stamped] : 2764644

[Stamped] : Received July 14, 1943, Claims Control Section

[Stamped] : Received, Revenue Agent in Charge, Los Angeles Division,
July 30, 1943

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amt. Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp: Received Mar. 6, 1943, Coll. Int. Rev., Los Angeles, Cal.

State of California,

County of Los Angeles—ss: 202604—1940 List.

Name of taxpayer or purchaser of stamps: Anastatia St. Clair.

Business address: 210 South Occidental, Los Angeles, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Sixth California.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1939, to December 31, 1939.
3. Character of assessment or tax Income tax.
4. Amount of assessment, \$3,941.35; dates of payment Quarterly in 1940.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded.....\$1,296.13.
7. Amount to be abated (not applicable to income or estate taxes).....
8. The time within which this claim may be legally filed expires, under Section 322 of the Internal Revenue Code, on March 15, 1943.

The deponent verily believes that this claim should be allowed for the following reasons:

This claim is based upon the exclusion from gross income of one half of the amount of \$11,750.00, as community income, received by deponent's husband from St. Clair Estate Company during the taxable year and reported as a taxable dividend. In the case of that corporation, relative to its personal holding company surtax liability for the calendar year 1939, now pending before the Tax Court of the United States, B. T. A. Docket No. 109162, the issue is whether distributions made by said corporation during the taxable year were distributions in liquidation chargeable to capital or distributions chargeable to earnings and profits.

This claim is being filed to protect the taxpayer's interests in the event it should be finally decided that said distributions are chargeable to capital.

Signed ANNASTATIA ST. CLAIR.

Sworn to and subscribed before me this 24th day of Feb., 1943.

/s/ A. M. CHASE.

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column).

Period	Assess. List	Acct. No.	Amount Assessed	Paid, Abated, or Credited Date	Amount
939	IT 1940	202604	\$3,941.35	3/15/40	\$985.34 Pd.
	* Trf. fr.	202605/40 L.		6/15/40	985.34*
				9/16/40	985.34 Pd.
				12/14/40	985.33 Pd.
			Total, \$3,941.35	Total, \$3,941.35	

[Stamped] : I. T. Schedule 33961 Rejected

HARRY C. WESTOVER, Collector of Internal Revenue,
(District) 6th Calif. smd.

Admitted in evidence May 8, 1950.

DEFENDANT'S EXHIBIT C

United States of America—Treasury Department—Washington

(Date) October 21, 1949.

To All To Whom These Presents Shall Come, Greeting :

I certify that the annexed is a true copy of Claim for Refund of \$1,327.19, Income Tax for 1939, filed by L. P. St. Clair, Los Angeles, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury :

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division, Income Tax Unit,
Bureau of Internal Revenue.

Claim

To be filed with the Collector where assessment was made or tax paid

[Stamped] : 2764642

[Stamped] : Received July 14, 1943, Claims Control Section

[Stamped] : Received, Revenue Agent in Charge, Los Angeles Division,
July 30, 1943

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amt. Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp: Received Mar. 6, 1943, Coll. Int. Rev., Los Angeles, Cal.

State of California,
County of Los Angeles—ss : 202605—1940 List.

Name of taxpayer or purchaser of stamps : L. P. St. Clair.

Business address : 210 South Occidental, Los Angeles, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete :

1. District in which return (if any) was filed Sixth California.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1939, to December 31, 1939.
3. Character of assessment or tax Income tax.
4. Amount of assessment, \$4,299.75; dates of payment Quarterly in 1940.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded.....\$1,327.19.
7. Amount to be abated (not applicable to income or estate taxes).....
8. The time within which this claim may be legally filed expires, under Section 322 of the Internal Revenue Code, on March 15, 1943.

The deponent verily believes that this claim should be allowed for the following reasons :

This claim is based upon the exclusion from gross income of one half of the amount of \$11,750.00, as community income, received by deponent from St. Clair Estate Company during the taxable year and reported as a taxable dividend. In the case of that corporation, relative to its personal holding company surtax liability for the calendar year 1939, now pending before the Tax Court of the United States, B. T. A. Docket No. 109162, the issue is whether distributions made by said corporation during the taxable year were distributions in liquidation chargeable to capital or distributions chargeable to earnings and profits.

This claim is being filed to protect the taxpayer's interests in the event it should be finally decided that said distributions are chargeable to capital.

Signed L. P. ST. CLAIR.

Sworn to and subscribed before me this 24th day of Feb., 1943.

/s/ A. M. CHASE.

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax : (Show, in

the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column).

Period	Assess. List	Year	Acct. No.	Amount Assessed	Paid, Abated, or Credited Date	Amount
1939	IT	1940	202605	\$4,299.75	3/15/40	\$1,074.94 Pd.
3/15/40	Trf. to	202604/40	L.	985.34	6/14/40	2,060.28 Pd.
					9/16/40	1,074.93 Pd.
					12/14/40	1,074.94 Pd.
				Total, \$5,285.09	Total, \$5,285.09	

[Stamped] : I. T. Schedule 33961 Rejected

HARRY C. WESTOVER, Collector of Internal Revenue,
(District) 6th Calif. smd.

Admitted in evidence May 8, 1950.

DEFENDANT'S EXHIBIT D

United States of America—Treasury Department—Washington

(Date) October 21, 1949.

To All To Whom These Presents Shall Come, Greeting :

I certify that the annexed is a true copy of Claim for Refund of \$1,189.91, Income Tax for 1940, filed by L. P. St. Clair, Los Angeles, California, on file in this Department.

In Witness Whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

By direction of the Secretary of the Treasury :

[Seal] /s/ A. L. DUNCAN,
Assistant Head, Records Division, Income Tax Unit,
Bureau of Internal Revenue.

Claim

To be filed with the Collector where assessment was made or tax paid

[Stamped] : 2764641

[Stamped] : Received July 14, 1943, Claims Control Section

[Stamped] : Received, Revenue Agent in Charge, Los Angeles Division,
July 30, 1943

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☐ Refund of Tax Illegally Collected.
- ☐ Refund of Amt. Paid for Stamps Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp: Received Mar. 6, 1943, Coll. Int. Rev., Los Angeles, Cal.

State of California,
County of Los Angeles—ss: 204489—1941 List.

Name of taxpayer or purchaser of stamps: L. P. St. Clair.

Business address: 210 South Occidental, Los Angeles, California.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Sixth California.
2. Period (if for income tax, make separate form for each taxable year) from January 1, 1940, to December 31, 1940.
3. Character of assessment or tax Income tax.
4. Amount of assessment, \$5,791.85; dates of payment Quarterly in 1941.
5. Date stamps were purchased from the Government.....
6. Amount to be refunded.....\$1,189.91.
7. Amount to be abated (not applicable to income or estate taxes).....
8. The time within which this claim may be legally filed expires, under Section 322 of the Internal Revenue Code, on March 15, 1944.

The deponent verily believes that this claim should be allowed for the following reasons:

This claim is based upon the exclusion from gross income of one half of the amount of \$6,500.00, as community income, received by deponent from St. Clair Estate Company during the taxable year and reported as a taxable dividend. In the case of that corporation, relative to its personal holding company surtax liability for the calendar year 1940, now pending before the Tax Court of the United States, B. T. A. Docket No. 109162, the issue is whether distributions made by said corporation during the taxable year were distributions in liquidation chargeable to capital or distributions chargeable to earnings and profits.

This claim is being filed to protect the taxpayer's interests in the event it should be finally decided that said distributions are chargeable to capital.

Signed L. P. ST. CLAIR.

Sworn to and subscribed before me this 24th day of Feb., 1943.

/s/ A. M. CHASE.

Certificate

I certify that an examination of the records of this office shows the following facts as to the assessment and payment of the tax: (Show, in the ninth column, by symbols "Pd.," "Ab.," or "Cr.," the nature of each entry in the eighth column).

Period	Assess. List	Year	Acct. No.	Amount Assessed	Paid, Abated, or Credited Date	Amount
1940	IT	1941	204489	\$5,791.85	3/15/41	\$1,447.96 Pd.
					6/13/41	1,447.96 Pd.
					9/15/41	1,447.96 Pd.
					12/15/41	1,447.97 Pd.
				Total, \$5,791.85	Total, \$5,791.85	

[Stamped] : I. T. Schedule 33961 Rejected

HARRY C. WESTOVER, Collector of Internal Revenue,
(District) 6th Calif. smd.

Admitted in evidence May 8, 1950.

[Title of District Court and Cause.]

No. 9712-Y Civil.

NOTICE OF APPEAL

Notice Is Hereby Given, that Annastatia St. Clair, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on July 31, 1950.

/s/ H. B. THOMPSON,
Attorney for Appellant.

[Endorsed]: Filed September 22, 1950. [202]

[Title of District Court and Cause.]

No. 9711-Y Civil.

NOTICE OF APPEAL

Notice Is Hereby Given, that L. P. St. Clair, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on July 31, 1950.

/s/ H. B. THOMPSON,
Attorney for Appellant.

[Endorsed.] Filed September 22, 1950. [203]

[Title of District Court and Causes.]

Nos. 9711-Y and 9712-Y Civil.

DESIGNATION OF RECORD ON APPEAL AND ASSIGNMENTS OF ERROR

To the clerk of the above court:

You are hereby requested to make a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following, and no other papers and exhibits, to wit:

- (1) All pleadings.
- (2) The Stipulations between the parties, together with all exhibits thereof. [204]
- (3) The court's Memorandum Decision filed May 15, 1950.

(4) The Conclusions of Law filed pursuant to the direction given in the Memorandum Decision.

(5) The Judgments entered June 31, 1950.

(6) The Notices of Appeal filed September 22, 1950.

(7) Notice by Clerk of Entry of Judgment.

(8) The Designation of Record on Appeal and Assignments of Error.

(9) This Designation of Record on Appeal and Assignments of Error and service thereon.

The following constitute the specifications of error upon which appellants rely:

I.

The court erred in stating in its opinion that the issues involved in these cases concerned distributions of the St. Clair Estate Company for the years 1938 and 1940, whereas the case involves distributions of said corporation for the years 1939 and 1940.

II.

The court, without justification in law or in the uncontroverted stipulation which was adopted as its findings of fact, wrongfully and erroneously concluded that the appellants' theory that distributions of the St. Clair Estate Company made during the years 1939 and 1940 were distributions in liquidation of said corporation was an afterthought conceived solely for appellants' tax advantage.

III.

The court erred as a matter of law in concluding that the Order of the Superior Court in and for Kern County entered December 23, 1938, abrogated the plan of complete liquidation adopted by the Board of Directors of the St. Clair Estate Company on December 22, 1938, and approved by the stockholders on December 23, 1938.

IV.

The court erred in stating as a fact, which it relied upon in its opinion, a matter contrary to the undisputed stipulated facts that "Pending the determination of this lawsuit, neither the corporation nor its directors could take any action towards such disposition of the property as a 'winding up' would require [205] * * *," whereas it is stipulated by the parties that the distributions made by the St. Clair Estate Company in the years 1939 and 1940 were made pursuant to the Orders of the Superior Court in and for Kern County in Action No. 33107 entitled "In the Matter of the St. Clair Estate Company, a Corporation, in the Process of Voluntary Winding Up," said action being an action for court supervision of the winding up and dissolution of said corporation pursuant to the then California Civil Code, Section 403.

V.

The court erred as a matter of law in concluding that the distributions of the St. Clair Estate Company made in the years 1939 and 1940 were capable of classification as income, on the one hand, or as

what the court, laboring under a misapprehension of law, mistakenly called "corpus," on the other hand.

VI.

The court erred in concluding that the payment made during the calendar years 1939 and 1940 by the St. Clair Estate Company to appellants were dividends taxable at ordinary rates.

VII.

The court erred in determining that the corpus of the St. Clair Estate Company could not have been distributed and was not distributed until the judgment in the action brought by Cora St. Clair for an accounting of the assets of the St. Clair Estate Company became final on January 18, 1945.

VIII.

The court erred in concluding that appellants have not overcome the burden of showing that the Commissioner's determination was erroneous and that the payments made by the St. Clair Estate Company to appellants in 1939 and 1940 were dividends taxable at ordinary rates and not distributions either in partial or complete liquidation.

IX.

The court erred in failing to find that the distributions made by the St. Clair Estate Company to appellants in the calendar years 1939 and 1940 were distributions in complete liquidation of said corporation which should be applied against and

in reduction of appellants' basis for their [206] stock.

Said transcript to be prepared as required by law and the rules of this court and the Federal Rules of Civil Procedure, and to be filed in the office of the clerk of the Circuit Court at San Francisco on or before the 1st day of November, 1950.

Dated: October 10, 1950.

/s/ H. B. THOMPSON,
Attorney for Appellants.

Service of above Designation of Record on Appeal and Assignments of Error accepted and acknowledged this 11th day of October, 1950.

/s/ EUGENE HARPOLE,
Attorney for Appellee.

[Endorsed]: Filed October 11, 1950. [207]

[Title of District Court and Causes.]

Nos. 9711-Y and 9712-Y Civil.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel for the purpose of the record on appeal that when these causes came on for hearing before Judge Leon R. Yankwich, a Motion was made by the plaintiffs to consolidate the cases for trial. The

Motion was joined in by the defendant and an Order of the Court was entered so consolidating them.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorney for Plaintiffs.

EARNEST TOLIN,
United States Attorney. [208]

E. H. MITCHELL,
Assistant United States
Attorney.

EDWARD R. McHALE,
Assistant United States
Attorney.

EUGENE HARPOLE,
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ EDWARD R. McHALE,
Attorneys for United States
of America, Defendant.

[Endorsed]: Filed October 23, 1950. [209]

[Title of District Court and Causes.]

Nos. 9711-Y and 9712-Y Civil.

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 209, inclusive, contain the original Complaint, Answer, Memorandum Decision, Conclusions of Law, Judgment and Notice of Entry of Judgment in each of the above-entitled causes; Motion to consolidate for Trial; Plaintiff's Exhibits 1 and 2; Defendants' Exhibits A, B, C and D; Notice of Appeal in each of the above-entitled causes; Designation of Record on Appeal and Assignments of Error; and Stipulation which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00, which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 24th day of October, A.D. 1950.

EDMUND L. SMITH,

Clerk.

[Seal] By/s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12721. United States Court of Appeals for the Ninth Circuit. L. P. St. Clair and Annastatia St. Clair, Appellants, vs. United States of America, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed October 26, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

[Title of District Court and Causes.]

Nos. 9711-Y and 9712-Y Civil.

ORDER

It appearing that the transcript of the oral stipulation between the parties in the above-entitled causes was omitted from the record certified and transmitted to the Ninth Circuit Court of Appeals, it is hereby ordered that said stipulation, which has been reduced to writing, signed by counsel for the parties involved and dated October 26, 1950, be certified by the Clerk and transmitted to the Ninth Circuit Court of Appeals as a supplemental record on the appeal taken from the judgments in these cases.

/s/ LEON R. YANKWICH,
United States District Court
Judge.

Dated October 26, 1950.

[Endorsed]: Filed U.S.D.C. October 30, 1950.

[Endorsed]: Filed U.S.C.A. November 1, 1950.

[Title of District Court and Causes.]

Nos. 9711-Y and 9712-Y Civil.

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel that at the hearing of these causes before Honorable

Leon R. Yankwich on May 8, 1950, it was orally stipulated and accepted as a part of the record that in the case of each of the plaintiffs the distributions made by the St. Clair Estate Company during the calendar years 1939 and 1940 did not exceed the basis of his/her stock.

Dated October 26, 1950.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorney for Plaintiffs.

EARNEST TOLIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

EDWARD R. McHALE,
Assistant United States
Attorney.

EUGENE HARPOLE,
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for United States
of America, Defendant.

[Endorsed]: Filed U.S.D.C. October 30, 1950.

[Endorsed]: Filed U.S.C.A. November 1, 1950.

In the Circuit Court of Appeals
for the Ninth Circuit

No. 12721

L. P. ST. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ANNASTATIA ST. CLAIR,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

DESIGNATION OF POINTS AND OF THE
RECORD FOR PRINTING

Come now the appellants in the above-entitled cause and hereby adopt as their statement of points on which they intend to rely on this appeal the statement of points on appeal as it now appears in the transcript of the record herein.

Appellants hereby designate for printing the entire certified transcript of the record.

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,

Attorney for Appellants.

EARNEST TOLIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

EDWARD R. McHALE,
Assistant United States
Attorney.

EUGENE HARPOLE,
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for United States
of America, Appellee.

Receipt of copy acknowledged.

[Endorsed]: Filed November 2, 1950.

[Title of Court of Appeals and Causes.]

STIPULATION

It is hereby stipulated and agreed by and between the parties hereto through their respective counsel that the "Designation of Points and of the Record for Printing" be modified to eliminate therefrom the following:

Referring to the index of the record prepared by the Clerk of the District Court, said index lists

“Exhibits: Plaintiff’s No. 1.” Said Exhibit No. 1 consists of a stipulation and “attached exhibits” A-W, inclusive.

It is hereby agreed not to print “attached exhibits” A (consisting of nine pages, pp. 46-54) and T (consisting of twenty-two pages, pp. 151-172).

DEMPSEY, THAYER,
DEIBERT & KUMLER,

By /s/ H. B. THOMPSON,
Attorneys for Appellants.

EARNEST TOLIN,
United States Attorney.

E. H. MITCHELL,
Assistant United States
Attorney.

EDWARD R. McHALE,
Assistant United States
Attorney.

EUGENE HARPOLE,
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ EDWARD R. McHALE,
Attorneys for United States
of America, Appellee.

So Ordered:

/s/ WILLIAM DENMAN,
Chief Judge.

/s/ WILLIAM HEALY,

/s/ WALTER L. POPE,
United States Circuit Judges.

[Title of Court of Appeals and Causes.]

PETITION TO TRANSMIT ORIGINAL
DOCUMENTS

In the interest of reducing the costs of appeal, request is respectfully made hereby that in lieu of printing the following, the originals thereof be considered by the court as a part of the transcript of the record certified on appeal:

So much of plaintiffs' Exhibit No. 1 as consists of Exhibits A and T thereto attached.

DEMPSEY, THAYER,
DEIBERT & KUMLER.

By /s/ H. B. THOMPSON.

[Endorsed]: Filed November 15, 1950.

No. 12,721

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. P. ST. CLAIR and ANNASTATIA ST. CLAIR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

THERON LAMAR CAUDLE,

Assistant Attorney General,

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Department of Justice Building,

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600 Federal Building,

Los Angeles 12, California,

FILED

MAY 11 1951

RAUL H. O'BRIEN,

CLERK

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No. 12,721

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. P. ST. CLAIR and ANNASTATIA ST. CLAIR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From the United States District Court for the
Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The opinion of the District Court in the *L. P. St. Clair* case [R. 22-26] is reported in 90 Fed. Supp. 249. The memorandum opinion in the *Annastatia St. Clair* case [R. 48-49] is not reported.

Jurisdiction.

This appeal involves federal income taxes for the calendar years 1939 and 1940. The taxes in dispute are in the amounts of \$1,327.19 and \$1,189.91, respectively, in the case of L. P. St. Clair [R. 7, 12] and \$1,296.13 and \$1,138.49, respectively, in the case of Annastatia St. Clair [R. 35, 39]. The taxes in each case were paid in quarterly installments in 1940 and 1941. [R. 3, 8, 31, 36.] Claims

for refund were filed on July 14, 1943. [R. 165-173, Deft. Exs. A-D.] Each of the claims was rejected by the Commissioner of Internal Revenue by registered letter dated December 23, 1948, pursuant to Section 3772(a)(2) of the Internal Revenue Code. [R. 7, 11, 35, 39.] Thereafter and within the time provided in Section 3772 of the Internal Revenue Code or on May 20, 1949, the taxpayers brought actions in the District Court for recovery of the taxes paid [R. 3-13, 31-40], and the actions were ordered consolidated for trial on March 28, 1950 [R. 21]. Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1346. The judgments were entered on July 31, 1950. [R. 29-30, 51-52.] Within sixty days and on September 22, 1950, a notice of appeal was filed in each action [R. 173, 174] pursuant to the provisions of 28 U. S. C., Section 1291.

Question Presented.

Is the finding of the District Court that distributions of earnings and profits of a corporation in 1939 and 1940 were taxable dividends, rather than distributions in partial liquidation, clearly erroneous?

Statutes and Regulations Involved.

The applicable statutes and regulations are set forth in the Appendix, *infra*.

Statement.

The facts as stipulated [R. 53-66, 158-159] and as found by the District Court [R. 22-26] may be summarized as follows:

The St. Clair Estate Company was organized in 1903 by the St. Clair family consisting of father, mother, three

sons and one daughter. After the death of the father and mother in 1904 all of the 1,200 shares of stock of the corporation were divided equally between the three sons, L. P. St. Clair, E. S. St. Clair, F. C. St. Clair, and the daughter, Cora St. Clair. The three brothers became directors. Cora St. Clair eventually lost her stock through a pledgee's sale and an execution sale and the stock was subsequently acquired by E. S. St. Clair. However, the corporation continued to pay her amounts which aggregated \$80,000 between 1917 and 1928. [R. 53-54.]

Ever since 1910 there had been dissension between Cora and her brothers, which in 1928 resulted in Cora filing suit against them. This suit was settled by agreement, which provided that 300 shares of the corporation's stock should be transferred to a trustee for the benefit of Cora and her son. The agreement also provided that from January 31, 1929, the surplus profits thereafter accumulated should be determined annually as nearly as practicable on February 1 and dividends declared distributing such surplus to the stockholders. Cora's share was to be paid in twelve equal monthly installments. [R. 54-55.]

Prior to 1938 the directors of the company made no formal declaration of dividends and no entry thereof was made on the minute book. However, during each of the years following the execution of the settlement agreement, with few exceptions, Cora's trustee was paid \$500 per month as dividends. During this time the three brothers had accounts on the books of the company designated "Dividend Accounts" to which were credited from time to time amounts payable to them and which were debited with payments made to them from time to time upon their demand. [R. 56.]

On December 22, 1938, Cora filed an action (No. 33,053) in the Superior Court of the State of California in and for the County of Kern against the corporation and her three brothers. In it she accused them of mismanagement and fraud and asked for a dissolution of the corporation and for an accounting in respect to its affairs. She did not question the validity of the dividends shown on the St. Clair Estate Company's books as payable to the brothers but contended that they owed the corporation sums in excess thereof, and upon that basis she asked that the St. Clair Estate Company be restrained from paying any moneys to the brothers as dividends or otherwise pending trial of the action. On the same day the court issued a temporary restraining order forbidding the corporation or any of the brothers from "disposing" of the corporation's assets "excepting in the general and ordinary course of business" and forbidding it from "declaring or paying any dividends" to its shareholders. [R. 56-57, 67-70.] The order was later made permanent pending trial of the action. [R. 58-59.]

On December 23, 1938, the directors of the corporation held a meeting at which they adopted, among others, resolutions declaring that all sums paid Cora's trustee from January 31, 1929, through December 31, 1937, were and constituted dividends for the year in which paid, and further declaring that the corporation's action in crediting and paying to the three brothers equalizing dividends so that the total dividends paid to each stockholder for the period January 31, 1929, through December 31, 1937, would aggregate \$56,000 was ratified and confirmed. They also adopted a resolution authorizing a distribution of \$20 per share, or a total of \$24,000 payable forthwith. The resolutions further authorized the officers to sell securities

held by the corporation for the purpose of providing funds to satisfy the distributions authorized thereby, or to distribute such securities in kind. [R. 57-58, 70-77.]

Before the meeting of the directors held on December 23, 1938, had adjourned, a copy of the court order entered on the preceding day was served, and the brothers, immediately following adjournment, and on December 23, 1938, obtained a modification of the order so as to remove the restraint against the declaration of dividends. However, the restraint on payment continued in full force and effect. The distribution of \$24,000 was recorded on the St. Clair Estate Company's books in December, 1938, by entries debiting dividends declared with that amount and crediting the dividend account of Cora's trustee and each of the three brothers with the amount of \$6,000 with the explanation "to record dividends for the year 1938." [R. 58.]

On the same day, December 23, 1938, the shareholders of the St. Clair Estate Company held a meeting at which it was resolved that the corporation wind up its affairs and voluntarily dissolve, and the officers and directors were authorized and directed to take such steps as might be necessary in that direction. A plan of distribution of the assets was adopted. [R. 149-157.]

On January 10, 1939, Cora, her son and the trustee filed in the Superior Court of California for Kern County a shareholders' petition (Action No. 33,107) for court supervision of the winding up of the affairs of the St. Clair Estate Company, as provided for under the California Civil Code. After hearing was had on the petition an order was filed on April 20, 1939, providing that the corporation's affairs be wound up under the supervision of the court and that no distribution should be made of the

St. Clair Estate Company's assets or property except by order of the court. [R. 59.]

The District Court found [R. 23] that the resolutions of the shareholders adopted at their meeting of December 23, 1938, were stayed in their effect by the institution of proceedings by Cora St. Clair and the injunction issued on December 23, 1938. The court further found [R. 23] that the subsequent institution by the corporation (the court made a clerical error in using the word "corporation," as it was actually Cora who instituted these proceedings also) of an action in the same Superior Court seeking the court's assistance in winding up the affairs of the corporation was of no effect as a liquidation; that the Superior Court in the "dissolution" action could not proceed with any pattern of liquidation of the corpus of the estate until the rights of the shareholders were determined [R. 23].

On April 28, 1939, the court, pursuant to the stipulation of the parties, ordered that the St. Clair Estate Company pay the sum of \$24,000 to its stockholders (\$6,000 each). The stipulation stated that the marketable value of the corporation's assets was \$250,000. [R. 25, 97.] Thereafter, on October 13, 1939, the court construed the distribution authorized in its order of April 28, 1939, to be a distribution from the income of the corporation, rather than from its capital assets. [R. 59, 99-100.] The dividend was paid on May 8, 1939. The stockholders' dividend accounts on the St. Clair Estate Company's books were debited with the amounts paid them and on the stubs of the checks issued for the payment were entered the statement "Account dividend declared December 23, 1938." Each of the brothers in his 1938 return reported as dividends and income received in 1938, the amount of \$6,000

representing his part of the dividend, and paid the tax thereon. Subsequently the Treasury Department refunded to the brothers the tax paid on the amounts so reported. [R. 59-60.]

On December 27, 1939, the directors authorized the distribution of \$23,000 to the shareholders payable forthwith. The purpose of the dividend was stated to be the distribution of the net earnings of the company for 1939, in order to escape penalties to which personal holding companies are subject for failure to distribute their net income. [R. 60, 103.]

Pursuant to the stipulation of the parties in Action No. 33,053 that the restraining order might be so modified, the court, on December 27, 1939, entered its order authorizing and directing the payment by the St. Clair Estate Company to its stockholders in 1939 "amounts up to the net earnings of said corporation for the year 1939." Thereafter on the same day a stipulation of the parties was filed in Action No. 33,107 authorizing the distribution to the shareholders of \$23,000. Later the same day checks for \$5,750 were delivered to each of the four shareholders of the St. Clair Estate Company. In their 1939 income tax returns taxpayers included in income as dividends received in 1939 the sum of \$11,750 distributed to them as hereinabove set forth during the calendar year 1939 consisting of the \$6,000 authorized by the resolutions of December 23, 1938, and the \$5,750 authorized by the resolutions of December 27, 1939. [R. 60-61.]

Pursuant to stipulation of the parties, the Superior Court, in Action No. 33,107, during 1940 entered four orders directing payment by the St. Clair Estate Company in that year of amounts totalling \$26,000. An order entered June 4, 1940, directed the payment of \$6.66 per

share "out of the earnings of 1940." [R. 61, 134-135.] An order entered October 3, 1940, directed the payment of \$4,000 "out of the St. Clair Estate Company income on hand." [R. 61, 136.] An order entered December 11, 1940, directed the payment of \$8.33 per share "out of the earnings of the above corporation for the year 1940 solely." [R. 61, 138.] An order entered December 26, 1940, directed the payment of a dividend of \$3.33 $\frac{1}{3}$ per share "solely out of and from income that has accrued to the said corporation for the calendar year 1940 and that is now available for said purpose." [R. 61-62, 139-140.] The minutes of the meetings of the board of directors held in 1940 authorizing the foregoing distributions state that they were declared because the corporation would "suffer heavy penalties unless distribution is made of its net income for the year 1940" [R. 62, 127, 131], and in order to distribute "further income" to its shareholders [R. 62, 133].

The District Court found [R. 25] that the Superior Court of California for Kern County recognized the binding effect of the injunction by modifying it to the extent of permitting the payments of profits only.

The fair market value of distributions made by the St. Clair Estate Company to the taxpayers as shareholders during 1939 and 1940 did not exceed their basis for computing gain on the stock. [R. 158.]

The four distributions authorized during the year 1940 were paid by the corporation, each of the shareholders receiving as his share \$6,500. In their 1940 federal income tax returns taxpayers included in income and reported as dividends the amount so received. [R. 62.]

The stockholders of the St. Clair Estate Company did not surrender any of their certificates of stock in the corporation, and the corporation did not cancel any certificates or shares of its stock in the years 1939 through 1949. [R. 61, 62, 159.]

Thereafter proceedings involved in Actions Nos. 33,053 (the accounting action) and 33,107 (the winding up action) proceeded simultaneously. The accounting action was terminated adversely to Cora on January 18, 1945. The winding up action was terminated in 1949 [Exhibit T transmitted in its original form]. [R. 62-63.]

The St. Clair Estate Company claimed a dividend paid credit for each of the years 1939 and 1940 in the total amount of the distributions made. Its net income for each of the years was less than the amount of the distributions. Its earned surplus at the close of each of the years was in excess of \$150,000. The Commissioner found a deficiency against the corporation for the years 1937 to 1940. The determination was appealed (*St. Clair Estate Co. v. Commissioner*, 9 T. C. 392). The Government prevailed as to 1937 and 1938 and the taxpayer prevailed as to 1939 and 1940. Both parties appealed, but on November 3, 1948, each of the parties dismissed its appeal. [R. 63-64.]

Thereafter the St. Clair Estate Company filed with the Commissioner a notice of intention to claim a deficiency dividend credit under Section 506 of the Internal Revenue Code for the year 1937, and on June 22, 1948, made a

distribution to its stockholders as provided in Section 506 (c) of the Internal Revenue Code. Thereafter it filed its claim for credit and the claim was allowed in full. [R. 64.]

On February 18, 1949, and within the time permitted by law, the St. Clair Estate Company filed with the Commissioner its notice of intention to claim a deficiency dividend credit for the year 1938. Prior thereto, however, the St. Clair Estate Company, on October 28, 1948, paid the 1938 deficiency found by the Tax Court to be \$8,318.77. Thereafter the corporation filed in the Superior Court of California for Kern County, in Action No. 33,107, a petition for an order distributing assets of the corporation in final liquidation, praying therein that the corporation be permitted to distribute its assets so that the time and distribution thereof would permit the corporation to obtain a deficiency dividend credit which would operate to expunge the 1938 deficiency. Accordingly, on December 30, 1948, the court entered an order conforming with the prayer in the petition. [R. 64-65.]

Final distribution of the remaining assets of the St. Clair Estate Company was made September 29, 1949 [R. 65, 148], and order of final dissolution of the corporation was entered January 12, 1950 [R. 65-66].

On these facts the District Court concluded that the distributions made to stockholders during 1939 and 1940 were dividends taxable at ordinary rates, and that taxpayers are not entitled to recover the taxes sued for for those years. [R. 27-28.]

Summary of Argument.

1. The District Court's finding that the distributions in 1939 and 1940 were ordinary dividends, instead of distributions in liquidation, is correct. As is shown by the corporate resolutions and the court orders approving the payments, the distributions were intended and were paid as distributions of the corporation's earnings, for the purpose of securing dividends paid credits to avoid the personal holding company surtax. Since the corporation had sufficient current and accumulated earnings to cover the distributions, they constitute dividends as defined by Section 115 (a) and (b) of the Internal Revenue Code, and are taxable in full under Section 22 (a) of the Code. It was stipulated that the distributions were not made in cancellation or redemption of the stock, and this fact is fatal to taxpayers' contention that the distributions were partial liquidating distributions, under either Section 115 (i) or (c). Moreover, they were not intended as liquidating distributions.

2. Actually the corporation was not engaged in liquidating during the taxable years, as the District Court correctly found. Although a resolution looking toward liquidation was adopted by the stockholders, this was after the injunction had been served on the corporation preventing it from disposing of its assets and property, and from declaring and paying dividends. Thus, liquidating distributions could not be made and the process of liquidation was stalled by the court until after the rights of the parties were determined. It follows that the dividends later paid

pursuant to court order were not distributions made while the corporation was liquidating, where the litigation was unsettled and the court had not yet authorized liquidation and distribution of the assets.

3. Taxpayers erroneously state that in the corporation's case the Tax Court has previously decided that the distributions in question were distributions in liquidation. The Tax Court merely assumed that they were without so deciding and disposed of the issue as to whether the corporation was entitled to dividends paid credits in the amount of its stipulated net income for 1939 and 1940 on that assumption.

4. Not only do the distributions involved here fail to meet the definition of "complete liquidation" in Section 115 (c) because they were not made in complete cancellation or redemption of the stock, but they also fail to meet the definition for the reason that the liquidation was not completed within the three year period there specified.

5. Even if the distributions are assumed *arguendo* to be distributions in partial liquidation within Section 115 (i) and (c), they still must be taxed as dividends under Section 115 (g). Since the purpose was to distribute earnings to obtain dividends paid credits and since the earnings were sufficient to cover the distributions, the distributions were essentially equivalent to taxable dividends within the meaning of Section 115 (g).

ARGUMENT.

The District Court Did Not Err in Determining That the Payments Involved Herein Were Dividends Taxable as Ordinary Income.

The only question in this case is whether the lower court erred in finding that the distributions of \$47,000 in 1939 and \$26,000 in 1940 by the St. Clair Estate Company to its shareholders were ordinary dividends, taxable in full under Section 22(a) of the Internal Revenue Code (Appendix, *infra*), rather than, as taxpayers contend (Br. 15), "partial distributions in complete liquidation of the corporation." It is the Government's position that the District Court's classification of the distributions as dividends is overwhelmingly supported by the evidence and is plainly correct.

As stated by the trial court [R. 22] and acknowledged by taxpayers (Br. 14), the question of whether payments were ordinary dividends or distributions in liquidation is one of fact (*cf. National Grocery Co. v. Commissioner*, 111 F. 2d 328 (C. A. 9th); *Jones v. Dawson*, 148 F. 2d 87, 90 (C. A. 10th); *Gossett v. Commissioner*, 59 F. 2d 365, 367 (C. A. 4th); *Helvering v. Edison Securities Corp.*, 78 F. 2d 85 (C. A. 4th)), as to which the decision of the trial court is final unless clearly erroneous (*Crown Williamette Paper Co. v. McLaughlin*, 81 F. 2d 365, 368 (C. A. 9th)). Although it is true as taxpayers point out, that the facts upon which the trial court's determination was predicated were entirely stipulated, the judgment of the trial court is not subject to reversal in the absence of clear error. *Boehm v. Commissioner*, 326 U. S. 287, 293; *Cardillo v. Liberty Mutual Co.*, 330 U. S. 469, 478; *Commissioner v. Rainier Brewing Co.*, 166 F. 2d 324 (C. A. 9th); *Seattle Brewing & Malting Co. v. Commissioner*,

166 F. 2d 326 (C. A. 9th); *Schaepppe v. Commissioner*, 168 F. 2d 284 (C. A. 9th); *Raffold Process Corp. v. Commissioner*, 153 F. 2d 168, 171 (C. A. 1st); *Gaytime Frock Co. v. Liberty Mut. Ins. Co.*, 148 F. 2d 694, 696 (C. A. 7th); *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123 etc.*, 137 F. 2d 176 (C. A. 5th). The most recent statement of the law in this respect is the *Mine Hill & Schuylkill Haven R. Co. v. Smith*, 184 F. 2d 422 (C. A. 3d), where the court said (p. 426):

* * * the question * * * *is purely one of fact* to be determined in the first instance by the trier of the facts; the circumstance that the facts are stipulated does not make the issue any less factual in nature; the trier of the facts is entitled to draw whatever inferences and conclusions it deems reasonable from such facts; it is immaterial that different conclusions might fairly be drawn from the undisputed or stipulated facts and the appellate court is *limited* to a consideration whether the fact finding was “clearly erroneous” and the decision of the trial court was “in accordance with law” * * *.

At any rate, the facts in the instant case so clearly compel the conclusion reached by the trial court that a precise delimitation of the appellate scope of review is hardly essential.

Section 115(a) of the Code (Appendix, *infra*) defines a dividend as *any* distribution by a corporation to its shareholders out of its earnings or profits accumulated after February 28, 1913, or out of earnings or profits of the taxable year without regard to the amount of the (accumulated) earnings at the time the distribution is made, and Section 115(b) (Appendix, *infra*) establishes a rule that every distribution is made out of earnings or profits

to the extent thereof, and from the most recently accumulated earnings or profits. An exception to this rule is stated in Code Section 115(c) (Appendix, *infra*) which provides that in the case of amounts distributed in partial liquidation, the part of such distribution which is properly chargeable to capital account should not be considered a distribution of earnings or profits.

Section 115(i) of the Code (Appendix, *infra*) defines “amounts distributed in partial liquidation” as, insofar as here material, one of a series of distributions in complete cancellation or redemption of all or a portion of a corporation’s stock. And under Section 115(c) such a distribution is treated as one in part or full payment in exchange for the stock, with only the gain on the exchange subject to tax. Such gain is considered as a short-term capital gain (taxable in full), except in the case of amounts distributed in complete liquidation, and for this purpose “complete liquidation” includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all its stock in accord with a bona fide plan of liquidation under which the transfer of the property is to be completed within a time specified in the plan not in excess of three years from the close of the taxable year during which the first of the series of distributions is made under the plan.

1. In this case the distributions in both 1939 and 1940 have all the characteristics of an ordinary dividend and they clearly were dividends. They were made and authorized as distributions on the stock for the purpose of distributing the earnings and profits of the corporation. Thus the directors on December 23, 1938, voted the payment forthwith of a dividend of \$24,000 on the outstanding stock out of the earned surplus and surplus profits.

[R. 74.] While immediate payment of this dividend was prevented by the restraining order served December 23, 1938, which enjoined the disposition of any of the corporation's assets, including the payment of any dividends [R. 69], the court ordered it paid on April 28, 1939 [R. 97-99], and subsequently on October 13, 1939, construed this order to be a distribution and payment of \$24,000 from the income of the corporation, rather than from its capital assets [R. 99-100]. On December 27, 1939, the directors authorized the payment of a 1939 dividend of \$23,000 on the outstanding stock, the resolution stating that the corporation's net income for 1939 was estimated to be \$23,000 and the corporation wished to distribute the earnings to avoid liability for the personal holding company penalty surtax. [R. 103-104.] An order of the court authorizing payment by the corporation to stockholders in 1939 of amounts up to the net earnings of the corporation for 1939 was entered the same day. [R. 60.] Similarly resolutions were adopted by the directors in 1940, authorizing payment forthwith of dividends of \$8,000, \$4,000, \$10,000 and \$4,000, total \$26,000, for the purpose of distributing the estimated net earnings of the corporation for 1940 [R. 125-128, 136, 129-131, 132-134], and the Superior Court entered orders approving payment of the dividends out of the earnings of 1940 or out of the income on hand [R. 134-135, 136-137, 138-139, 139-140].

The corporation's net income for 1939 actually was \$21,417.48 and for 1940 \$19,107.58, but its accumulated earnings and profits at the close of each year were in

excess of \$150,000. [R. 63.] Consequently, not only were the distributions of \$47,000 in 1939 and \$26,000 in 1940 intended to be ordinary dividends on the outstanding stock, as the corporate resolutions and the court orders show, but also the distributions were plainly dividends as defined by Section 115(a), that is, distributions of the current earnings to the extent thereof and then of the accumulated earnings, as provided in Section 115(b).

The distributions here wholly fail to meet the definition of a distribution in partial liquidation contained in Section 115(i) since they were not one of a series of distributions in complete cancellation or redemption of all or a part of the stock. Neither all nor any part of the stock was cancelled or redeemed by the distributions, as was stipulated. [R. 61, 62.] The par value of the stock was not reduced by the distributions in 1939-1940, the stock was not called in, and no endorsement was made on the stock or on the books indicating a cancellation of any part. Instead each distribution was on the full amount of the outstanding stock, none of which was cancelled or redeemed until many years later (1950). [R. 159.] In these circumstances, the distributions cannot be classed as made in partial liquidation, for the statutory definition contains the criteria which must be met for such classification for purposes of Section 115. *Wilcox v. Commissioner*, 137 F. 2d 136 (C. A. 9th); *Thornton v. Commissioner*, 159 F. 2d 578 (C. A. 7th); *Jones v. Dawson*, 148 F. 2d 87, 90 (C. A. 10th); *Beattie Inv. Co. v. United States*, 101 F. 2d 850 (C. A. 8th). For the reason that the distributions in question were not

made as one of a series in cancellation or redemption of all the stock, they likewise do not fall within the definition of "complete liquidation" in Section 115(c), if that definition is pertinent in this case.¹

Furthermore, an important element in determining whether payments are dividends or distributions in partial liquidation is whether the payment was made with the intention that it be a liquidating distribution or one in the ordinary course of business. *Holmby Corp. v. Commissioner*, 83 F. 2d 548, 549-550 (C. A. 9th); cf. *Beretta v. Commissioner*, 141 F. 2d 452, 454 (C. A. 5th), certiorari denied, 323 U. S. 720; *Tootle v. Commissioner*, 58 F. 2d 576, 580 (C. A. 8th). Here in the taxable years, the St. Clair Estate Company did not distribute any of its property other than its earnings and profits. Instead it continued to hold its properties as before and to collect the income therefrom. That is, it, as a personal holding company, appears to have conducted its ordinary business in the usual way and to have paid the dividends in question as distributions in the ordinary course of business. The intent of the directors was unquestionably, as the resolutions already referred to show, to distribute the earnings to avoid the personal holding company surtax, rather than to make a liquidating distribution.

¹The term "complete liquidation" in Section 115(c) is defined, as stated, for the purpose of the preceding sentence. The preceding sentence reads:

Despite the provisions of section 117, the gain so recognized should be considered as a short-term capital gain, except in the case of amounts distributed in complete liquidation.

If the distributions here are assumed *arguendo* to be distributions in partial liquidation, there would be no gain, it having been stipulated that the taxpayers had not fully recovered their cost bases for the stock through receipt of the distributions in 1939 and 1940. [R. 158.]

That these payments were intended as ordinary dividends rather than distributions in liquidation is confirmed by the fact that they were very small in relation to the value of the corporation's assets, which were stated in the minutes to be about a quarter of a million dollars. [R. 25.] Plainly, if distributions in liquidation had been intended, the directors would have sought to pay out a more substantial part of the corporation's total resources.

2. The District Court found in effect that the corporation was not in the process of liquidation in 1939-1940, because the injunction issued and served on December 23, 1938, stayed all effort to carry out the plan to liquidate until after the rights of Cora and her brothers in the corporation and its assets had been determined. [R. 23.] A brief analysis of the facts confirms the correctness of this conclusion.

The stock of the St. Clair Estate Company was held equally by taxpayer L. P. St. Clair, his two brothers, and a trustee for their sister and her son. [R. 53-55.] On December 22, 1938, Cora filed a suit (Action No. 33,053) against the corporation and the three brothers in which she asked for dissolution of the corporation and for an accounting in respect to its affairs, and on December 22, 1938, an order was signed in that action enjoining the corporation, the officers and her brothers from declaring dividends or in any other way disposing of the corporate assets. [R. 57, 67.] The restraining order was originally temporary, but was later continued in effect pending the trial of the action. [R. 59.] On December 23, 1938, a meeting of the board of directors of the corporation was held at which, among other things, it was resolved: (1) that all sums of money paid to or for the benefit of Cora from January 31, 1929, to and including December 31,

1937, constituted dividends in the year in which paid; (2) that the payment of amounts in the year 1938 to the three brothers to equalize their returns from the corporation with the amounts received by Cora between 1929 and 1937 was ratified; (3) that a dividend aggregating \$24,000 be declared out of the earned surplus and surplus profits of the corporation, payable "forthwith," \$6,000 each to Cora and the three brothers. [R. 57, 73.] Before the meeting of the board of directors had adjourned a copy of the court order entered on the preceding day was served, and the brothers, immediately following the adjournment, and on December 23, 1938 (the same day), obtained a modification of the order to permit the declaration of dividends. [R. 58, 94.] Thereafter, on the same day, the shareholders of the St. Clair Estate Company resolved "to wind up the affairs of the corporation and voluntarily dissolve." [R. 153, Br. 15-16.]

On January 10, 1939, Cora filed a shareholders' petition (Action No. 33,107) for court supervision of the winding up of the affairs of the St. Clair Estate Company, and on April 20, 1939, an order was filed in that action providing that the corporation's affairs be wound up under the supervision of the court and that no distribution should be made of the St. Clair Estate Company's assets or property except by order of the court. [R. 59.] Up to this time the \$24,000 dividend declared at the December 23, 1938, directors' meeting [R. 58, 74] had, of course, not been paid, since the directors were under an injunction against paying any dividends [R. 58, 69].

Since the stipulation of facts [R. 58] and taxpayers' brief (pp. 15-16) show that the accounting proceedings were instituted and the injunction served on the directors before the shareholders voted to liquidate, and since no-

where does the record indicate that liquidation had been previously contemplated, much less authorized, by the corporation, the shareholders' resolution was never of any effect. But even had the shareholders voted to liquidate before the injunction, such liquidation would have been, as stated by the trial court, stayed in its effect pending the outcome of the accounting action. The same is true of the action brought by Cora for court supervision of the "winding up." This proceeding was instituted after the injunction, at a time when all parties concerned knew that no steps, other than the purely technical ones, of filing various papers in the winding up action, could be taken toward liquidation during the pendency of the accounting action, and, in fact, no such steps were taken until after the disposition of that action.

Of great significance is the fact that as far as the record shows the St. Clair Estate Company continued its business exactly as theretofore, that is to say, it held various properties, collected the income from them, and distributed this income to its shareholders. The position of the taxpayers amounts to no more than a contention that, because the stockholders might have desired to liquidate the corporation—a desire which was frustrated by judicial action—distributions of current earnings made subsequent thereto must be treated as liquidating distributions, despite the fact that the corporation did not liquidate its business, but, on the contrary, continued it exactly as in the past. The mere statement of this contention is sufficient to demonstrate its invalidity. It is, of course, of some significance that the assets of the corporation were not distributed in cancellation of the stock until some 10 years later.

Moreover, the officers and directors of the St. Clair Estate Company, of whom taxpayer L. P. St. Clair was

one, apparently did not consider that the corporation was in liquidation, since they failed to comply with the requirements of Section 148 (Appendix, *infra*), which provides that:

Every corporation shall, within thirty days after the adoption by the corporation of a resolution or plan for the dissolution of the corporation or for the liquidation of the whole or any part of its capital stock, render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan * * *.

The St. Clair Estate Company seems to have been well informed as to the provisions of the Internal Revenue Code, it employed tax counsel [R. 102-103], and its failure to comply with the requirements of Section 148 is strongly indicative of the fact that at the time of the payments no one concerned considered the corporation to be in the process of liquidation.

Taxpayer's assumption (Br. 26) that the court would have dismissed the liquidating action, had it intended to stay liquidation, is entirely without foundation, and contrary to the court's own order in the accounting action, which, without more, had the effect of halting any actual liquidation until final disposition of that suit. While taxpayers are correct in stating (Br. 30-31) that the court could and did lift the restraining order to the extent of allowing the distribution of current earnings, they err in concluding that anything resembling a liquidation could be accomplished as long as the restraining influence of the injunction was in force, and it *was* in force during the taxable years as to actual liquidating distributions.

We submit that the finding of the District Court that the corporation was not in process of liquidation in 1939

and 1940 is clearly correct, and it therefore follows that distributions in those years could not, even in the ordinary sense, be regarded as distributions in liquidation. However, even if the view is taken that the corporation was in liquidation during those years, contrary to the finding, taxpayers are in no better position. As already shown, the distributions do not meet the definition of distributions in liquidation prescribed by Section 115(c) and (i) for tax purposes, since they were not made in redemption or cancellation of stock.

3. Contrary to the taxpayers' assertion (Br. 23), the Tax Court in *St. Clair Estate Co. v. Commissioner*, 9 T. C. 392, did not hold that the 1939 and 1940 distributions were distributions in complete liquidation of the corporation. Its holding was that, as the corporation claimed, it was entitled to dividends paid credits in 1939 and 1940 in the full amount of its stipulated net income for those years. In so holding, the Tax Court said (p. 406):

Since petitioner was technically in liquidation, we shall assume, *arguendo*, that the so-called dividend distributions were distributions in liquidation.

On that assumption, the Tax Court considered whether the distributions were properly chargeable to the current year's earnings (stipulated net income); it concluded that they were and thus allowed the credits. Since the taxpayer made no contention that it was entitled to greater credits, the Tax Court did not consider or decide whether or not the amount of the distributions in excess of the current year's earnings was properly chargeable to accumulated earnings. It has been shown above that these excess distributions were distributions of the accumulated earnings. Far from deciding that the distributions in question ac-

tually were distributions in liquidation, as taxpayers assume the Tax Court did, the Tax Court stated further (p. 409):

* * * it is evident from the entire record before us that petitioner [St. Clair Estate Company], its directors, and the court having supervision over its winding up intended those distributions to be only such distributions as would conform with the economic and fiscal policies encouraged by the personal holding company provisions of the Federal revenue laws * * *.

Thus, the Tax Court's view was entirely consonant with the District Court's views in this case.

It is true that before the Tax Court in the corporation's case the Commissioner took the position that the distributions were in liquidation. But the taxpayers have also reversed their position in this case, since they originally treated the payments involved here as dividends. At any rate, there is no rule which prevents the Commissioner from changing his position as to the legal effect of facts, when he becomes convinced that his first position was not correct. The question here, of course, is whether the District Court was correct in determining that the distributions were ordinary dividends rather than distributions in liquidation, a question which the Tax Court did not decide.

4. Taxpayers endeavor to show that the distributions by their corporation in 1939 and 1940 qualify as distributions in a "complete liquidation" as that term is defined in Section 115(c). Assuming that that statute is pertinent to this case, it is obvious that the distributions in question do not meet the definition, for as shown they were not part of a series in complete cancellation or redemption of all of the stock. Furthermore, the statute requires that the plan

must provide for the liquidation to be completed within a time specified, not exceeding three years from the close of the taxable year during which the first of the series of distributions under the plan is made. Taxpayers contend (Br. 20-21) that because the shareholders resolved to liquidate "forthwith", there was a compliance with the terms of the statute, even though the liquidation was not effected in the three year period, and cite Tax Court cases holding that a plan to liquidate "immediately" suffices, despite the fact that the liquidation took longer than three years. This position of the taxpayers has been adequately answered in *Burnside Veneer Co. v. Commissioner*, 167 F. 2d 214, 218 (C. A. 6th), where the court held that the statute makes completion within the statutory period mandatory. And in *Heyman v. Commissioner*, 176 F. 2d 389 (C. A. 2d), the court, in holding that the time limit was essential to a plan of liquidation said (p. 393):

And, moreover, there was no such time limit as the statute made an essential part of a plan of complete liquidation. The only time fixed for distribution was that it should be after all the liabilities of the company were paid and that they should be paid as soon as possible. Thus, it is apparent that substantial compliance with the statute was lacking and that the Tax Court correctly recognized that.

In any event, since the shareholders did not resolve to liquidate until after the accounting suit had been filed and the injunction served, at which time they were unable to take any effective steps toward liquidation, it is patent that they could not have really intended to carry out a plan of liquidation forthwith.

5. Even if the view were taken that the distributions were liquidating distributions in complete cancellation or

redemption of the stock, nevertheless they would be taxable as dividends under Section 115(g) (Appendix. *infra*). Thus, the District Court's judgment is correct and would have to be affirmed.²

Section 115(g) provides that if a corporation cancels or redeems its stock at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in cancellation of stock, to the extent it represents a distribution of accumulated earnings, shall be treated as a taxable dividend. The 1939 and 1940 distributions here, assuming *arguendo* that they were in partial cancellation of the stock, would be covered by this section. *Cf. Wilcox v. Commissioner*, 137 F. 2d 136, 139 (C. A. 9th). No other conclusion would be possible in view of the fact that the distributions were made for the purpose of distributing the corporation's current earnings, in order to obtain dividends paid credits and to avoid the personal holding company surtax. Thus, they were made at such time and in such manner as to be essentially equivalent to taxable dividends. (*Vesper Co. v. Commissioner*, 131 F. 2d 200 (C. A. 8th).) And since as shown the corporation had earnings for the taxable years and accumulated earnings considerably in excess of the distributions, the distributions represent a distribution of these

²The United States, as respondent on appeal, may urge any ground in support of the judgment below. *Helvering v. Gowran*, 302 U. S. 238; *LeTulle v. Scofield*, 308 U. S. 415, rehearing denied, 309 U. S. 694.

earnings and are taxable as dividends. *Wilcox v. Commissioner, supra*; *Vesper Co. v. Commissioner, supra*, p. 205; *Flanagan v. Helvering*, 116 F. 2d 937, 939-940 (C. A. D. C.); *Hirsch v. Commissioner*, 124 F. 2d 24 (C. A. 9th); *Bazley v. Commissioner*, 155 F. 2d 237 (C. A. 3d), affirmed, 331 U. S. 737.

Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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March, 1951.

APPENDIX.

Internal Revenue Code:

SEC. 21. NET INCOME.

(a) *Definition*.—"Net income" means the gross income computed under section 22, less the deductions allowed by section 23.

* * * * *

(26 U. S. C. 1946 ed., Sec. 21.)

SEC. 22. GROSS INCOME.

(a) *General Definition*.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest, in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * * *

(e) *Distributions by Corporations*.—Distributions by corporations shall be taxable to the shareholders as provided in section 115.

* * * * *

(26 U. S. C. 1946 ed., Sec. 22.)

SEC. 27. CORPORATION DIVIDENDS PAID CREDIT.

* * * * *

(g) *Distributions in Liquidation*.—In the case of amounts distributed in liquidation the part of such

distribution which is properly chargeable to the earnings or profits accumulated after February 28, 1913, shall, for the purposes of computing the basic surtax credit under this section, be treated as a taxable dividend paid.

* * * * *

(26 U. S. C. 1946 ed., Sec. 27.)

SEC. 115 [As amended by Section 214 (b) of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 186 (a) and (b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. DISTRIBUTIONS BY CORPORATIONS.

(a) *Definition of Dividend.*—The term “dividend” when used in this chapter (except in section 203 (a) (3) and section 207 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, (1) out of its earnings or profits accumulated after February 28, 1913, or (2) out of the earnings or profits of the taxable year (computed as of the close of the taxable year without diminution by reason of any distributions made during the taxable year), without regard to the amount of the earnings and profits at the time the distribution was made. Such term also means any distribution to its shareholders, whether in money or in other property, made by a corporation which, under the law applicable to the taxable year in which the distribution is made, is a personal holding company, or which, for the taxable year in respect of which the distribution is made under section 504 (c) or section 506 or a corresponding provision of a prior income tax law, is a personal

holding company under the law applicable to such taxable year.

(b) *Source of Distributions*.—For the purposes of this chapter every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earnings and profits accumulated after February 28, 1913, have been distributed, but any such tax-free distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113. The preceding sentence shall not apply to a distribution which is a dividend within the meaning of the last sentence of subsection (a).

(c) *Distributions in Liquidation*.—Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of a corporation shall be treated as in part or full payment in exchange for the stock. The gain or loss to the distributee resulting from such exchange shall be determined under section 111, but shall be recognized only to the extent provided in section 112. Despite the provisions of section 117, the gain so recognized shall be considered as a short-term capital gain, except in the case of amounts distributed in complete liquidation. For the purpose of the preceding sentence, “complete liquidation” includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under

which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding, from the close of the taxable year during which is made the first of the series of distributions under the plan, (1) three years, if the first of such series of distributions is made in a taxable year beginning after December 31, 1937, or (2) two years, if the first of such series of distributions was made in a taxable year beginning before January 1, 1938. In the case of amounts distributed (whether before January 1, 1939, or on or after such date) in partial liquidation (other than a distribution to which the provisions of subsection (h) of this section are applicable) the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits. If any distribution in complete liquidation (including any one of a series of distributions made by the corporation in complete cancellation or redemption of all its stock) is made by a foreign corporation which with respect to any taxable year beginning on or before, and ending after, August 26, 1937, was a foreign personal holding company, and with respect to which a United States group (as defined in section 331 (a) (2)) existed after August 26, 1937, and before January 1, 1938, then, despite the foregoing provisions of this subsection, the gain recognized resulting from such distribution shall be considered as a short-term capital gain—

(1) Unless such liquidation is completed before July 1, 1938; or

(2) Unless (if it is established to the satisfaction of the Commissioner by evidence submitted before

July 1, 1938, that due to the laws of the foreign country in which such corporation is incorporated, or for other reason, it is or will be impossible to complete the liquidation of such company before such date) the liquidation is completed on or before such date as the Commissioner may find reasonable, but not later than December 31, 1938.

(d) *Other Distributions from Capital*.—If any distribution made by a corporation to its shareholders is not out of increase in value of property accrued before March 1, 1913, and is not a dividend, then the amount of such distribution shall be applied against and reduce the adjusted basis of the stock provided in section 113, and if in excess of such basis, such excess shall be taxable in the same manner as a gain from the sale or exchange of property. * * *

* * * * *

(g) *Redemption of Stock*.—If a corporation cancels or redeems its stock (whether or not such stock was issued as a stock dividend) at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock, to the extent that it represents a distribution of earnings or profits accumulated after February 28, 1913, shall be treated as a taxable dividend.

* * * * *

(i) *Definition of Partial Liquidation*.—As used in this section the term “amounts distributed in partial liquidation” means a distribution by a corporation in complete cancellation or redemption of a part of its

stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock.

* * * * *

(26 U. S. C. 1946 ed., Sec. 115.)

SEC. 148. INFORMATION BY CORPORATIONS.

* * * * *

(d) *Contemplated Dissolution or Liquidation.*—Every corporation shall, within thirty days after the adoption by the corporation of a resolution or plan for the dissolution of the corporation or for the liquidation of the whole or any part of its capital stock, render a correct return to the Commissioner, verified under oath, setting forth the terms of such resolution or plan and such other information as the Commissioner shall, with the approval of the Secretary, by regulations prescribe.

(e) *Distributions in Liquidation.*—Every corporation shall, when required by the Commissioner, render a correct return, duly verified under oath, of its distributions in liquidation, stating the name and address of each shareholder, the number and class of shares owned by him, and the amount paid to him or, if the distribution is in property other than money, the fair market value (as of the date the distribution is made) of the property distributed to him.

* * * * *

(26 U. S. C. 1946 ed., Sec. 148.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

Sec. 19.115-1 [As amended by T. D. 5228, 1943 Cum. Bull. 183]. *Dividends*.—The term “dividend” for the purpose of chapter 1 (except when used in sections 203 (a) (3) and 207 (c) (1) thereof) comprises any distribution in the ordinary course of business, even though extraordinary in amount, made by a domestic or foreign corporation to its shareholders out of either—

(1) earnings or profits accumulated since February 28, 1913, or

(2) earnings or profits of the taxable year computed without regard to the amount of the earnings or profits (whether of such year or accumulated since February 28, 1913) at the time the distribution was made.

The earnings or profits of the taxable year shall be computed as of the close of such year, without diminution by reason of any distributions made during the taxable year. For the purpose of determining whether a distribution constitutes a dividend, it is unnecessary to ascertain the amount of the earnings and profits accumulated since February 28, 1913, if the earnings and profits of the taxable year are equal to or in excess of the total amount of the distributions made within such year.

The term “dividend” also includes any distribution to shareholders (other than distributions under section 115 (c), relating to distributions in liquidation, section 115 (e), relating to distributions by personal service corporations, and section 115 (f), relating to

stock dividends) made by a corporation which, for the taxable year in which such a distribution is made or for the taxable year in respect of which it is made under section 504 (c), relating to dividends paid within two and one-half months after the close of the taxable year, or section 506, relating to deficiency dividends, or corresponding provisions of a prior income tax law, was under the applicable law a personal holding company. Such a distribution, if made on or after October 21, 1942, will constitute a taxable dividend even if not paid out of accumulated or current earnings or profits. For treatment of any distribution made prior to October 21, 1942, which is a dividend solely by reason of the last sentence of section 115 (a), see section 19.504-3.

A taxable distribution made by a corporation to its shareholders shall be included in the gross income of the distributees when the cash or other property is unqualifiedly made subject to their demands.

* * * * *

Sec. 19.115-5. *Distributions in liquidation.*—(a) *General.*—Amounts distributed in complete liquidation of a corporation are to be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation are to be treated as in part or full payment in exchange for the stock so canceled or redeemed. The gain or loss to a shareholder from a distribution in liquidation is to be determined, as provided in section 111 and section 19.111-1, by comparing the amount of the distribution with the cost or other basis of the stock provided in section 113; but the gain or loss will be recognized only to the extent provided in section 112.

(b) *Complete liquidation*.—In the case of amounts distributed in complete liquidation of a corporation, the amount of the gain or loss so recognized is subject in general to the limitations contained in section 117. For this purpose the term “complete liquidation” includes any one of a series of distributions made by a corporation in complete cancellation or redemption of all of its stock in accordance with a bona fide plan of liquidation and under which the transfer of the property under the liquidation is to be completed within a time specified in the plan, not exceeding, from the close of the taxable year during which is made the first of the series of distributions under the plan, (1) three years if the first of such series of distributions is made in a taxable year beginning after December 31, 1937, or (2) two years, if the first of such series of distributions was made in a taxable year beginning prior to January 1, 1938.

For the purposes of the last sentence of section 115 (c), a liquidation may be completed prior to the actual dissolution of the liquidating corporation but no liquidation is completed until the liquidating corporation and the receiver or trustees in liquidation are finally divested of all the property (both tangible and intangible).

* * * * *

(c) *Partial liquidation*.—In the case of amounts distributed in partial liquidation of a corporation, the amount of the loss recognized is subject to the limitations contained in section 117 but the entire amount of the gain recognized shall be considered as a short-term capital gain despite the provisions of section 117. The term “amounts distributed in partial liquidation”

means a distribution by a corporation in complete cancellation or redemption of a part of its stock, or one of a series of distributions in complete cancellation or redemption of all or a portion of its stock. A complete cancellation or redemption of a part of the corporate stock may be accomplished, for example, by the complete retirement of all the shares of a particular preference or series, or by taking up all the old shares of a particular preference or series and issuing new shares to replace a portion thereof, or by the complete retirement of any part of the stock, whether or not pro rata among the shareholders.

In the case of amounts distributed in partial liquidation, the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of section 115 (b) for the purpose of determining taxability of subsequent distributions by the corporation. (See sections 19.27(g)-1 and 19.115-11.)

Example: A, an individual whose taxable year is the calendar year, owns 20 shares of participating preferred stock of the Y Corporation, 10 shares of which he purchased in 1924 for \$1,060 and 10 shares of which he purchased in June, 1936, at \$2,000. On May 15, 1939, the corporation in a transaction qualifying as a partial liquidation redeemed the entire issue of preferred stock by paying the holders thereof \$141 per share, A receiving \$2,820 upon the surrender of his 20 shares of such stock. The gain of \$350 on the shares acquired in 1924 should be included in its entirety in A's gross income; but the loss of \$590 on the shares acquired in 1936 should be deducted in computing A's net income to the extent of $66\frac{2}{3}$ percent,

or \$393.33. (See section 117 (b). See also section 117 (c).)

Sec. 19.148-1. *Return of information as to payments of dividends.*—Section 148 provides that every corporation shall, when required by the Commissioner, render a correct return, duly verified under oath, of its payments of dividends, stating the name and address of each shareholder, the number of shares owned by him, and the amount of dividends paid to him. In accordance with that section, returns of information in respect of dividend payments shall be rendered for each calendar year as follows:

* * * * *

Sec. 19.148-2. *Return of information respecting contemplated dissolution or liquidation.*—(a) *Making and filing of returns.*—Within 30 days after the adoption of any resolution or plan for or in respect of the dissolution of a corporation or the liquidation of the whole or any part of its capital stock, the corporation shall file with the Commissioner of Internal Revenue, Washington, D. C., attention of the Income Tax Unit, Records Division, a correct return on Form 966, made under oath or affirmation and containing the information required by paragraph (b) of this section and by such form. A like return shall be filed by the corporation in the case of any amendment of, or supplement to, a resolution or plan for or in respect of the dissolution of the corporation or the liquidation of the whole or any part of its capital stock. A return must be filed under section 148 (d) in respect of a liquidation whether or not any part of the gain or loss to the shareholders upon the liquidation is recognized under the provisions of section 112.

(b) *Contents of return.*—(1) *General.*—There shall be attached to and made a part of the return required by section 148 (d) and paragraph (a) of this section a certified copy of the resolution or plan, together with any amendments thereof or supplements thereto, and such return shall in addition contain the following information:

- (i) The name and address of the corporation;
- (ii) The place and date of incorporation;
- (iii) The date of the adoption of the resolution or plan and the dates of any amendments thereof or supplements thereto; and
- (iv) The collection district in which the last income tax return of the corporation was filed and the taxable year covered thereby.

(2) *Returns in respect of amendments or supplements.*—If a return in respect of any resolution or plan for or in respect of the dissolution of a corporation or the liquidation of the whole or any part of its capital stock has already been filed pursuant to section 148 (d), a return in respect of any amendment thereof or supplement thereto will be deemed sufficient if it gives the date such prior return was filed and contains a duly certified copy of such amendment or supplement and all other information required by this section and by Form 966 which was not given in such prior return. If no return was filed relative to the resolution or plan which is being amended or supplemented, the return relative to the amendment thereof or supplement thereto shall contain a duly certified copy of the resolution or plan which is being amended or supplemented, together with all amendments thereof and supplements thereto, and all other information required by this section and by Form 966.

No. 12721

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

L. P. ST. CLAIR and ANNASTATIA ST. CLAIR,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANTS.

THOMAS R. DEMPSEY,
WELLMAN P. THAYER,
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REPLY BRIEF FOR APPELLANTS.

I.

As a Matter of Intention and as a Matter of Law, the 1939 and 1940 Distributions of the St. Clair Estate Company Were Partial Distributions in Complete Liquidation of the Corporation.

(a) *As a matter of law such distributions were liquidating distributions.* From and after the time that the Superior Court assumed jurisdiction in the supervisory liquidation and winding up proceeding all distributions made pursuant to its orders were partial distributions in complete liquidation for under Section 403 of the Civil Code (see Appx. of App. Op. Br.) the Court's jurisdiction was limited to settling claims, determining the relative rights of the shareholders and, "(12) the making of an order, upon the allowance or settlement of the final accounts of the directors, that the corporation has been duly

wound up and is dissolved. Upon the making of such order, the corporate existence shall cease except for purposes of further winding up if needed." "(13) Any and all other matters concerning the winding up of the affairs of the corporation."

As Judge Disney said in his dissenting opinion in *St. Clair Estate Co. v. Commissioner*, 9 T. C. 392 at 417:

"When we consider the fact that the Superior Court had, on April 20, 1939, ordered that the petitioner's affairs be wound up under the supervision of the court, and that no distribution of assets or property (other than in the ordinary course of business) be made except by order of court, and consider the charges made by Cora as basis for the suit filed, it seems apparent that the superior court, in approving the stipulations of the counsel in the cases that the distributions be made, was clearly, in the order made on December 26, 1939, to distribute 'in amounts up to the net earnings' for 1939, merely setting a limit on amount, and not in fact designating the distributions as out of 1939 income. The company in fact had no \$23,000 to distribute out of 1939 earnings, having to borrow \$10,000 to make the distribution. The superior court may be presumed to have known that a distribution, in the liquidation it was supervising, was no ordinary dividend, *Hellmich v. Hellman*, 276 U. S. 233, that distributions are to be regarded as in payment in exchange for the capital stock, and that, after the initiation of dissolution and liquidation, the entire corporate assets became a fund for payment of creditors and stockholders. Therefore, at least as to the distribution in 1939 and the \$4,000 distribution 'from income on hand' in October 1940, there is no room for finding or for reasonable inference that the court limited a dividend to

one derived from current earnings; and, considering the position of the court in the liquidation matter, I think that the other three orders should also be considered as merely designating or limiting the amounts of payment to the amount of 1940 earnings, rather than as designating the distributions as in fact made out of 1940 earnings, so as to enable the petitioner to rely on the orders as proof of that fact. The court had on December 22, 1938, restrained payment of dividends until an accounting should be had. Such accounting was not filed until January 30, 1941. Though the orders allowing distribution, above referred to, were modifications of the general restraining order, I think they were permission to make mere advancements in the process of liquidation, and subject to final accounting, and they do not demonstrate distributions of income of a particular year. Stockholders in a dissolved corporation have no rights except after all debts have been satisfied and their remedy is then in equity. Fletcher Cyclopedia of Corporations, vol. 16, Sec. 8224. The administration of the corporation by the superior court was consonant with such general law."

In so writing Judge Disney was spelling out the federal income tax effect of compliance with the state law, a matter which the respondent asserts was assumed *arguendo* by the majority of the court and concerning which we shall have more to say later. The point is, however, that nowhere in Respondent's Brief has he met or undertaken to meet this point.

(b) *As a matter of intention the distributions of the St. Clair Estate Company here in issue were partial distributions in complete liquidation.* Respondent asserts that it was the intention of the management of the St. Clair Estate Company to pay ordinary dividends (Resp. Br. p. 19). In support of this he points to the court orders directing that distributions be made from "earnings" or "income" of the year, that the distributions were relative to total capitalization small in amounts, that the corporation's capitalization was not reduced on its books, that it did not sell its assets, and that no form 966 was filed pursuant to Section 148, I. R. C. (Br. pp. 16, 17, 22).

As for earmarking the source of distributions, we have pointed out that the sources were in fact exceeded and may for that reason, if no other, be disregarded (App. Br. pp. 28, 29). But putting a name on a distribution or designating the source thereof will not make the difference between an ordinary dividend and a liquidating distribution. (*Hellmich v. Hellman*, 276 U. S. 233; *Tooth v. Commissioner* (C. C. A. 8th, 1932), 58 F. 2d 576; *Canal-Commercial Trust & Savings Bank v. Commissioner* (C. C. A. 5th, 1933), 63 F. 2d 619; *Rheinstrom v. Conner* (C. C. A. 6th, 1942), 125 F. 2d 790; *Gossett v. Commissioner* (C. C. A. 4th, 1932), 59 F. 2d 365; *Rollestone Corp.*, 38 B. T. A. 1093.) In the *Gossett* case the court said in applicable part (p. 367):

"Certainly at the time of the payment of the dividend in question the corporation was not a going concern, in the legal sense, as its dissolution was

already under way. It makes no difference what the directors called it when the dividend was declared, nor does the fact that subsequent dividends were termed 'liquidating' dividends when this particular dividend was not so termed after its character. The question of whether it was a 'partial liquidating dividend' is to be determined, not from what it was called, but by the facts as shown by the record. The record shows that it was a very unusual dividend, and entirely outside of the due course of the business of the corporation."

With respect to the size of the distributions, that made in 1939 [\$47,000.00, R. 60] was approximately 10% of the corporation's indicated net worth [\$476,147.18, R. 78] and that made in 1940 [\$26,000.00, R. 61] was approximately 5% of the corporation's net worth. How many corporations conducting business "as usual" distribute 15% of their net worth in two years? The evidentiary statement and the inference drawn by respondent are both wrong.

The fact that the corporation's capitalization was not reduced by book entries and that no certificates were called for cancellation is equally unimportant. (*Holmby Corporation*, 28 B. T. A. 1092, affirmed 83 F. 2d 548 (C. C. A. 9th); *Gossett v. Commissioner* (C. C. A. 4th, 1932), 59 F. 2d 365; *Tooth v. Commissioner* (C. C. A. 8th, 1932), 58 F. 2d 576; *Bacharach*, 29 B. T. A. 282; *Rollestone Corp.*, 38 B. T. A. 1093.) The equivalent of that was done as we pointed out in our brief at page 28 when the Superior Court admonished that any distributions

made pursuant to Court Order should be “charged against said stockholders accounts” and “deducted from or withheld from any moneys or property hereafter payable to said stockholders” [R. 98, 99].

The corporation was a personal holding company. It did nothing but hold investments left to the St. Clair children to invest and reinvest and distribute the net revenue therefrom (Pet. Br. p. 8). As we pointed out (Br. p. 17) it had assets and no liabilities of any consequence and it ultimately distributed its assets in kind. There was no reason for the corporation to sell its assets and for it to distribute cash. The plan of complete liquidation provided for distribution in kind (Br. pp. 16, 17) and it was carried out to the letter. After the plan was adopted the corporation never thereafter did any business. Its activities were then limited under court supervision to preserving the assets for distribution to the stockholders.

Finally the respondent asserts that failure of the corporation to file Treasury Department Form 966 pursuant to Section 148, I. R. C., is fatal. That section requires corporations making distributions in complete liquidation to file Form 966 so advising the Commissioner within thirty (30) days of adopting the plan of liquidation. A search of appellant's records failed to uncover a copy of such a return. But we know of no case where it has been held that failure to file such a return is in any wise fatal to appellant's case and respondent has cited no authority in support of the proposition that it is. The return is

merely an information return to aid in collection of taxes due by *shareholders*. (See Mertens, Par. 48.09.)

As far as intention is concerned, the management of the St. Clair Estate Company had a singular and twofold intention—singular in the sense that they wanted to do everything required of them by law, and twofold in the sense that they had to comply with both the state and federal laws. They were under Cora's proximate guns to comply in the accounting and liquidation proceedings with the state laws, and under the federal government's guns to make distributions or suffer the penalties of personal holding company surtaxes. Their problem was stated and made a matter of record in the minutes of the meeting of the Board of Directors held December 27, 1939 [R. 101-102]:

“The President further stated, and the Board of Directors unanimously agreed, that pursuant to proceedings commenced and then in progress, all of the assets of the Corporation would have been completely distributed to the persons entitled to thereto during the year 1938 and the Corporation would have been completely wound up and dissolved save for the filing of said legal proceedings and issuance of said restraining order and injunction.”

But we submit that there was in this particular no irreconcilable inconsistency in the duties owed the two sovereigns. The management intended to comply with both—neither to the exclusion of the other—and its primary intention was to liquidate and dissolve.

II.

The Tax Court Unanimously Held That the Distributions of the St. Clair Estate Company Made in 1939 and 1940 Were Partial Distributions in Complete Liquidation.

In his brief respondent asserts that appellant misinterprets the Tax Court's holding in *St. Clair Estate Company v. Commissioner*, 9 T. C. 392, in concluding that the Tax Court held that the distributions made by the corporation in 1939 and 1940 were partial distributions in complete liquidation (Resp. Br. p. 23). Such is not the case. The problem before the court in that case was as respondent properly states (Resp. Br. p. 23) to determine whether the corporation was entitled to dividends paid credits for 1939 and 1940. Of course, if the distributions were ordinary dividends there was no question but that the corporation was entitled to the credits necessary and no deficiencies would have been the result (see Sec. 27, I. R. C.). But the respondent took the position that the credits were not allowable because the distributions were partial distributions in complete liquidation not taxable as ordinary income in the hands of the shareholders and therefore no credit applied because no portion of the distributions was properly chargeable to capital account of the corporation.

But the Court did not dispose of the matter by holding that the distributions were ordinary dividends. Rather it cited and applied "Section 27(g), *Distributions in Liquidation*" and "Section 115(c), *Distributions in Liquida-*

tion.” Nowhere did it consider or discuss the question whether the distributions qualified as ordinary dividends. Furthermore, the line of cleavage between the majority opinion and the minority opinion regarding the years 1939 and 1940 was with respect to the legal consequence following upon a determination that the distributions were partial distributions in complete liquidation.

If there is room for any further doubt about this point, it should be dispelled by the Court’s statement at page 408 as follows:

“In the instant case we are of the opinion that the *facts*, which we have already related in detail, disclose, beyond reasonable doubt, that the distributions made by petitioner in 1939 and 1940 *were properly chargeable to its earnings or profits to the extent of its stipulated net income for those years*. It is only to this extent that petitioner now claims dividends paid credits on account of the distributions made in 1939 and 1940.” (Emphasis supplied.)

That is to say the *facts* required the application of Sections 27(g) and 115(c) both of which apply to liquidating distributions.

III.

The Plan of Complete Liquidation and the Execution Thereof Complied With the Statutory Requirements.

This point we think is adequately covered in our Opening Brief (Br. pp. 20-22), however, the respondent cites two cases which he asserts control this situation and are authority against appellant's views. The first thereof is *Burnside Veneer v. Commissioner*, 167 F. 2d 214, 218 (C. C. A. 6th), which is cited for the proposition that execution of the plan within the three-year period is mandatory. Reference to that case discloses that it involved the tax free liquidation by a parent corporation of a subsidiary corporation under Section 112(b)(6), I. R. C. The case at bar, however, involves the taxable liquidation of the St. Clair Estate Company and the effect of the distributions under Section 115(c), I. R. C. Without going further into the distinguishing facts, unduly lengthening this brief, let us quote from the Tax Court's decision in *George G. Mason*, 3 T. C. 1087, 1091-1092 (Acq. 1944 C. B. 19):

"It is apparent that the time requirements as to complete liquidation are more flexible in section 115(c) than in section 112(b)(6). Under the former section the plan of liquidation must be adopted in good faith and call for the complete transfer of the property of the liquidating corporation within three years after the close of the year in which the first of the series of distributions is made; while the latter section makes no requirement as to the good faith of the plan, but has a definite and absolute provision that if the transfer is not completed within three years no distribution can be considered as a distribution in complete liquidation. This material differ-

ence between the two sections of the same act, in both 1936 and 1938, one dealing in general with the liquidation of corporations and the other dealing with the liquidation of subsidiary corporations, indicates that Congress deliberately avoided in drafting section 115(c) the inflexible time requirement appearing in the proviso which it added to section 112(b)(6)(D), and that in section 115(c) the legislative emphasis was placed upon the good faith of the plan to complete the liquidating transfers within three years, rather than on the actual completion of the transfers within the specific time limit. Probably Congress had in mind that unforeseeable events might delay the liquidation of a corporation other than a wholly owned subsidiary corporation, even though when the liquidation was started all of the parties concerned believed in good faith and with reason that it would be completed as planned within two or three years.

“In the instant case a plan was adopted in good faith to liquidate the Chesapeake Corporation within three years after the close of the year 1938, when the first distribution was made. At the time the plan was adopted all things pointed to a speedy liquidation. Practically all of the assets were securities and cash, while the corporate liabilities were negligible. Then, over a year after the adoption of the plan, respondent asserted a claim against the corporation in an amount almost equal to the value of all its assets. Until this claim was settled liquidation was impossible. After the claim was settled the liquidation was completed within six months.

“We conclude that where, as in the instant case, there is adopted in good faith a plan of complete liquidation calling for liquidating transfers to be completed within the periods set out in section 115(c),

and an unforeseen event occurs after the adoption of the plan which makes the completion of the liquidating transfers impossible within the time called for by the plan, there is, nevertheless, a compliance with the provisions of section 115(c)."

The respondent also cites *Heyman v. Commissioner*, 176 F. 2d 389 (C. C. A. 2d). In that case the question was whether the receipt of distributions made by a corporation in 1938 and 1939 to its shareholders were ordinary dividends or liquidating distributions. The corporation, Mid-eastern Contracting Corporation, had a contract with the City of New York to build a subway. At the conclusion of the contract it had a claim for additional work and materials furnished which was ultimately settled in 1938 and 1939 with additional payments of \$66,290.59 and \$620,000.00 for those respective years. The corporation, in 1931, adopted a plan of complete liquidation and dissolution and filed its Certificate of Dissolution in 1931. Thereafter, it continued, pursuant to Section 42 of the Delaware General Corporation Law, for the limited purposes of winding up its affairs. By a contract made between the shareholders and the corporation, it was agreed that upon realization of the claim, distribution of the proceeds would be made to the shareholders as "creditors." In their 1938 and 1939 returns, the taxpayer-shareholder reported the proceeds of the claim as capital gain. The Commissioner asserted deficiencies and imposed penalties. The Tax Court held that the purported assignment of

1935 to the “creditors” was a sham and amounted merely to “a transparent subterfuge to evade taxation.”

It also held that the proceeds of the claim distributed in 1938 and 1939 was not pursuant to *any* plan of liquidation and for that reason did not qualify as distributions in complete liquidation. The Court of Appeals affirmed the Tax Court’s decision. The full text of the applicable portion of the Court’s opinion is as follows:

“We need not stop to point out everything which is lacking to make this the bona fide plan of distribution the statute requires as a prerequisite to treating distributions in installments as distributions in complete liquidation. It is obvious that it was not intended to be one as to the claim for it was a step in the splitting up of the assets following the attempt in 1935 to assign the claim in such a way that it would thereafter be no part of the assets of the corporation. And it is equally obvious that it did not conform to the requirements of the statute. *It came into existence many years after the corporation was dissolved and after some distributions in partial liquidation had been made. It was in reality no plan of complete liquidation at all but merely an agreement by persons who had control of the remnants of the corporate assets concerning the way they should dispose of them.* And, moreover, there was no such time limit as the statute made an essential part of a plan of complete liquidation. The only time fixed for distribution was that it should be after all the liabilities of the company were paid and that they

should be paid as soon as possible. Thus it is apparent that substantial compliance with the statute was lacking and that the Tax Court correctly recognized that.” (Emphasis supplied.)

The Court will observe in the first place that the decisions cited by appellants (Br. pp. 20-21) were decisions of the Tax Court. We call attention to the fact that in *Heyman v. Commissioner, supra*, the Court of Appeals affirmed the Tax Court’s decision which applied the same rule as the cases cited by appellants. The case is not applicable in the first place because in the case at bar there *was* a plan of complete liquidation which was never changed and was followed to the letter. Furthermore, in the case at bar the plan was to distribute the assets “forthwith” and at the time the plan was adopted the corporation’s total liabilities amounted to only \$498.35 [R. 78]. Finally, the issue is one of fact. The Tax Court and the Court of Appeals rightly held that under all the peculiar circumstances attendant in the *Heyman* case, there was no bona fide plan to liquidate within three years, but in the case at bar the bona fides of the plan adopted prior to the issuance of any injunction, calling for a distribution “forthwith” can not be challenged and we submit that the plan meets the statutory test.

IV.

Section 115(g), I. R. C., Has No Application to the
1939 and 1940 Distributions of the St. Clair Es-
tate Company.

In our opening brief we have reviewed at length the adoption and execution of the plan of complete liquidation of the St. Clair Estate Company (Br. pp. 15-24). Suffice it to say for this purpose that there is no justification whatsoever for any inference that the distributions here involved were made as a subterfuge for tax evasion purposes and consequently Section 115(g) has no application.

When that section was enacted in the 1926 Act the statement of the Managers on the part of the House declared in applicable part (Conf. Rep. 356, 69th Cong., 1st Session, p. 30):

“Amendment No. 1: It has been contended that under existing law a corporation, especially one which has only a few stockholders, might without resorting to the device of a stock dividend be able to make a distribution to its stockholders which would have the same effect as a taxable dividend. For example, assume that two men hold practically all the stock of a corporation, for which each had paid \$50,000 in cash, and the corporation had accumulated a surplus of \$50,000 above its cash capital. It is claimed that under existing law the corporation could buy from the stockholders for cash one-half of the stock held by them and cancel it without making the stockholders subject to any tax, yet this action in all essentials would be the equivalent of a distribution

through cash dividends of the earned surplus. Section 201(g) of the House bill rewrites the provision of the existing law to make clear that such a transaction as above indicated is taxable. *Obviously this subdivision does not apply in cases of a complete liquidation of all the stock of the corporation, or to one of a series of distributions in a complete liquidation which is bona fide carried out.* This amendment provides that in the case of the cancellation or redemption of stock not issued as a stock dividend this subdivision shall apply only if the cancellation or redemption is made after January 1, 1926; and the House recedes." (Emphasis supplied.)

Commenting on the application of this section Mertens Law of Federal Income Taxation states (Vol. 1, p. 633, Sec. 9.121):

"The provision relating to distributions equivalent to a dividend was intended to prevent circumvention of the surtax through employment of the forms of partial liquidation. The courts and the Board have accordingly held that, although the provision relating to distributions essentially equivalent to a dividend is on its face open to the interpretation of being applicable to any distribution in cancellation or redemption of stock where earnings or profits exist, it is nevertheless to be construed in the light of its history as aimed at tax avoidance and accordingly limited in its applicability to those situations where the circumstances justify the conclusion that a purpose existed to distribute earnings or profits in the guise of a partial liquidation."

Without laboring this brief further, we respectfully submit that the stipulated facts offer no justification for an inference that there was a purpose to evade taxes in

making the distributions of 1939 and 1940. The decision of the trial court is clearly erroneous and should be reversed with a direction to enter judgments for the appellants as prayed.

Respectfully submitted,

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No. 12722

United States
Court of Appeals
for the Ninth Circuit.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
a Corporation, et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

FILED

MAY - 6 1951

PAUL P. O'BRIEN

No. 12722

United States
Court of Appeals
for the Ninth Circuit.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
a Corporation, et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK, a Corporation,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Northern District of California,
Southern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 28049-H

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
a Corporation; CALIFORNIA MOTOR EXPRESS, LTD., a Corporation; VALLEY AND COAST TRANSIT COMPANY, a Corporation; COAST LINE EXPRESS, a Corporation; SUNSET TRANSFER COMPANY, a Corporation; RED LINE TRANSFER COMPANY, a Co-partnership; JAMES C. COUGHLIN, WILLIAM COUGHLIN, JOSEPH COUGHLIN, WARREN COUGHLIN and ROSE MARTIN, Co-partners, d.b.a. RED LINE TRANSFER COMPANY; JAMES COUGHLIN, d.b.a RED LINE TRANSFER COMPANY; BLACK COMPANY, a Corporation; WHITE COMPANY, a Co-partnership; FIRST DOE, SECOND DOE and THIRD DOE,

Defendants.

COMPLAINT

(Insurance Premiums)

Plaintiff complains of defendants and each of them:

I.

At all times herein mentioned, plaintiff was a corporation organized and existing under and by virtue of the laws of the State of New York and licensed to transact and transacting a general casualty insurance business in California.

II.

At all times herein mentioned defendants California Motor Transport Co., Ltd., California Motor Express, Ltd., Valley and Coast Transit Company, Coast Line Express, and Sunset Transfer Company were corporations, and each of them was a corporation, organized and existing under and by virtue of the laws of California and engaged in the business of a highway carrier in California.

III.

At all times herein mentioned defendants James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Martin were citizens and residents of California and co-partners doing business under the fictitious name and style of Red Line Transfer Company as the sole owners of said business.

IV.

At all times herein mentioned defendant James C. Coughlin, a citizen and resident of California, was doing business under the fictitious name and style of Red Line Transfer Company as the sole owner of said business, in San Francisco, California.

V.

The names of defendants Black Company, a corporation, White Company, a co-partnership, First Doe, Second Doe and Third Doe are fictitious names, and plaintiff prays that at such times as the true names of such defendants so named are ascertained, plaintiff will have leave of court to amend this complaint to insert the true names of said defendants.

VI.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

VII.

On or about September 1, 1946, at the request of defendants, and each of them, in San Francisco, California, plaintiff made, executed and issued to defendants its written contract of primary casualty insurance known as "Comprehensive General—Automobile," policy No. SPL 20968, which said policy was filed with the Railroad Commission of California, Transportation Department, Truck and Stage Division, wherein and whereby plaintiff insured defendants, and each of them, for one year against bodily injuries, with limits of liability of \$10,000 each person and \$20,000 each accident, and property damage, with limits of liability of \$5,000 each accident, as arising out of the ownership, maintenance and use of certain automobiles and trucks by defendants, and each of them, in their business, at the premium rate of \$2.00 per \$100.00 of gross

earnings of each of said defendants during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

VIII.

Thereafter plaintiff delivered said policy to Harry R. Cantlen, the agent of defendants and each of them, following which defendants reported claims and lawsuits under said policy to plaintiff and, pursuant to voluntary audit each month of the defendants, defendants remitted monthly premium payments to plaintiff, said payments being subject to final audit by plaintiff at said rate at the end of said policy period as aforesaid.

IX.

On or about December 19, 1946, plaintiff, pursuant to the terms of said policy, caused a written notice of cancellation of said policy to be mailed to defendants, and each of them, at the address shown on said policy, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947.

Pursuant to law and on or about said December 20, 1946, plaintiff notified said Railroad Commission of said notice of cancellation to defendants and each of them. On January 21, 1947, said policy was cancelled in accordance with said notices and each of them.

X.

Prior to said cancellation, and in accordance with said voluntary monthly audits made by defendants, and each of them, defendants paid to plaintiff the total sum of \$9,131.13.

Subsequent to said cancellation and as soon as possible thereafter, plaintiff caused the total earned premium of said policy for the period from September 1, 1946, to January 21, 1947, to be computed by final audit at said rate of \$2.00 per \$100 of gross earnings of defendants, said premium so computed being in the sum of \$15,081.64, leaving an unpaid balance of said total earned premium in the sum of \$5,950.51 due plaintiff from defendants.

XI.

On October 27, 1947, plaintiff made demand on defendants for said unpaid balance and no part of said unpaid balance of said total earned premiums due plaintiff has been paid by defendants, there being now due, owing and unpaid to plaintiff from defendants the sum of \$5,950.51, together with interest at the rate of 7% per annum from October 27, 1947.

For a second, separate and distinct cause of action, plaintiff complains of defendants, and each of them:

I.

Plaintiff refers to Paragraphs I to VI, inclusive, of the first cause of action and by this reference incorporates said paragraphs and each and all of

the allegations thereof in this, the second cause of action, with like force and effect as though the same were fully set forth herein.

II.

On or about September 1, 1946, at the request of defendants, and each of them, at San Francisco, California, plaintiff made, executed and issued to defendants its written contract of casualty insurance known as "Comprehensive General—Automobile," policy No. SPL 20950, which said policy was issued solely as excess insurance over the primary insurance provided for in "Comprehensive General—Automobile," policy No. SPL 20968 issued by plaintiffs to defendants, and each of them, as alleged in Paragraph VII in the first cause of action.

By said policy of excess insurance plaintiff insured defendants, and each of them, for one year against bodily injury, with limits of liability of \$100,000 each person and \$300,000 each accident, and property damage, with limits of liability of \$5,000 each accident, as arising out of the ownership, maintenance and use of said automobiles and trucks by defendants, and each of them, in their business, all in excess of said primary coverage and at the premium rate of \$.20 per \$100 of gross earnings of each said defendants during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

III.

Thereafter plaintiff delivered said policy to Harry R. Cantlen, the agent of defendants, and each of them, following which defendants reported claims and lawsuits under said policy to plaintiff.

IV.

On or about December 19, 1946, plaintiff, pursuant to the terms of said policy, caused a written notice of cancellation of said policy to be mailed to defendants, and each of them, at the address shown on said policy, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947, at which time said policy was cancelled in accordance with said notices and each of them.

V.

Subsequent to said cancellation, and as soon as possible thereafter, plaintiff caused the total earned premium of said policy for the period of September 1, 1946, to January 21, 1947, to be computed by final audit at said rate of \$.20 per \$100.00 of gross earnings of defendants, said premiums so computed being the sum of \$1,891.48 due plaintiff from defendants.

VI.

On October 27, 1947, plaintiff made demand on defendants for said unpaid premiums, and no part of said unpaid premiums due plaintiff has been paid by defendants, there being now due, owing

and unpaid to plaintiff from defendants the sum of \$1,891.48, together with interest at the rate of 7% per annum from October 27, 1947.

Wherefore, plaintiff prays that judgment be entered against defendants in the sum of \$7,841.99, together with interest at the rate of 7% per annum from October 27, 1947, until paid, and costs and such other and further relief as is meet and proper in the premises.

/s/ DAN HADSELL,

/s/ JOE G. SWEET,

/s/ EVERETT A. INGALLS,
HADSELL, SWEET &
INGALLS,

/s/ SYDNEY P. MURMAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 5, 1948.

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO BRING IN
THIRD PARTY DEFENDANT

Motion having been made to defendants, ex parte and before the service of their answer, before the above entitled Court, on the 18th day of June, 1948, and good cause appearing therefore,

It Is Hereby Ordered that said motion be, and the same is hereby granted and leave is hereby granted to serve upon Bayly. Martin & Fay, Inc.,

a corporation, summons and third party complaint, copies of which are annexed to the within Order.

Done in open Court this 18th day of June, 1948.

/h/ DAL M. LEMMON,

Judge of the United States
District Court.

[Endorsed]: Filed June 18, 1948.

In the United States District Court for the North-
ern District of California, Southern Division

No. 28049-H

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
a Corporation, et al.,

Defendants and Third Party Plaintiffs,

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,
Third Party Defendant.

[Title of District Court and Cause.]

THIRD PARTY COMPLAINT

Defendants above named, as Third Party Plaintiffs complain of Bayly, Martin & Fay, Inc., a cor-

poration, Third Party Defendant and for cause of action allege as follows:

I.

That at all times herein mentioned The Fidelity and Casualty Company of New York, was and is a corporation and existing under and by virtue of the laws of New York and licensed to transact and transacting a general casualty insurance business in California.

II.

At all times herein mentioned defendants and third party plaintiffs, California Motor Transport Co., Ltd., California Motor Express, Ltd., Valley and Coast Transit Company, Coast Line Express, and Sunset Transfer Company were and are corporations, and each of them was and is a corporation, organized and existing under and by virtue of the laws of California and engaged in the business of a highway carrier in California.

III.

At all times herein mentioned defendants and third party plaintiffs, James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Morton were and are citizens and residents of California and co-partners doing business under the fictitious name and style of Red Line Transfer Company as the sole owners of said business.

IV.

At all times herein mentioned defendant and third party plaintiff, James C. Coughlin, a citizen and resident of California, was doing business under the fictitious name and style of Red Line Transfer Company as the sole owner of said business, in Los Angeles, California.

V.

At all times herein mentioned third party defendant, Bayly, Martin & Fay, Inc., was and is a corporation, duly organized and existing under and by virtue of the laws of the State of California, and having license to act and acting in said state as an insurance broker.

VI.

The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

VII.

That at all times herein mentioned third party defendant Bayly, Martin & Fay, Inc., was the duly appointed and acting and was acting as agent and broker for the placing and maintenance of casualty insurance for and on behalf of third party plaintiffs.

VIII.

That there was in existence and in effect between third party plaintiffs and The Fidelity and Casualty Company of New York a certain written contract and policy of casualty insurance numbered SPL

1457 between the approximate dates September 1, 1945, to September 1, 1946; that said policy was obtained by third party defendant as agent for third party plaintiffs; that said policy of insurance provided for the payment by third party plaintiffs to said The Fidelity and Casualty Company of New York of a premium rate of 1.223% of and upon the gross earnings of third party plaintiffs; that third party plaintiffs regularly reported their gross earnings and remitted payment of said premiums to third party defendant, and the third party defendant acted and assumed to act as the agent of third party plaintiffs in all matters pertaining to said insurance; that prior to the expiration of the said policy and prior to the 1st day of September, 1946, the third party defendant took up with third party plaintiffs the matter of issuance by The Fidelity and Casualty Company of New York to third party plaintiffs of a new type of policy designated as a retrospective plan of insurance in place and stead of their existing insurance.

That prior to the 1st day of September, 1946, and on or about the 27th day of August, 1946, third party defendant delivered and forwarded to third party plaintiffs a certain contract of binder; that in connection therewith third party defendant represented to third party plaintiffs that, pending the negotiations upon the new plan of insurance above mentioned, the third party plaintiffs would continue to be covered by insurance provided by The Fidelity and Casualty Company of New York under and by

virtue of the aforementioned binder contract upon the same terms as were provided for in the aforementioned policy, SPL 1457, and particularly at the same premium rate of 1.223% of the gross earnings of third party plaintiffs; that said representations were made to third party plaintiffs by third party defendant with the intent to induce third party plaintiffs to rely thereon and to induce them to continue forwarding to the Fidelity and Casualty Company of New York via third party defendant premiums based upon the premium rate 1.223% of third party plaintiffs' gross earnings.

IX.

That third party plaintiffs did in fact rely upon the representations so made by third party defendant and did, during the aforementioned negotiations continue to forward monthly to The Fidelity and Casualty Company of New York via third party defendant its gross earnings' reports, estimated premiums, and premium payments all of the foregoing based upon the premium rate of 1.223% of third party plaintiffs' gross earnings; that the representations made by the third party defendant to third party plaintiffs were false and untrue; that third party defendant knew at the time it made such representations that such representations were in fact false and untrue; that on or about the 1st day of September, 1946, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insur-

ance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said The Fidelity and Casualty Company of New York at the time that the said third party defendant was acting as the agent and broker of third party plaintiffs.

X.

That said The Fidelity and Casualty Company of New York now claims from third party plaintiffs the sum of \$7,841.99 together with interest at the rate of 7% from and after October 27, 1947, as premiums due under said policies SPL 20950 and 20968; that said claim is the basis of the action herein filed and entitled The Fidelity and Casualty Company of New York, Plaintiff, vs. California Motor Transport Company, Ltd., a corporation, et al., defendants, No. 28049-H; that any liability of third party plaintiffs under this claim is the result of and was caused by the misrepresentations of third party defendant as aforesaid.

As for a second, separate and distinct cause of action third party plaintiffs allege:

I.

That third party plaintiffs incorporate herein by reference and make a part hereof as though fully

set forth herein paragraphs I to VIII, inclusive, and paragraph X of the first cause of action in this third party complaint.

II.

That the representation and suggestions so made by third party defendant to third party plaintiffs were false and untrue; that third party defendant in making such representations and suggestions had no reasonable ground for believing them to be true; that on or about the 1st day of September, 1946, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insurance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said Fidelity and Casualty Company of New York at the time that the said third party defendant was acting as the agent and broker of third party plaintiffs; that third party plaintiffs relied upon the representations and suggestions so made by third party defendant and continued to forward to third party defendant premiums based upon the premium rate of 1.223% of their gross earnings.

As and for a third, separate and distinct cause of action third party plaintiffs allege:

I.

Third party plaintiffs refer to paragraphs I to VIII, inclusive, and paragraph X, of the first cause of action in this third party complaint and incorporate said paragraphs by reference as though fully set forth herein, except that third party plaintiffs do not incorporate by reference and do not make a part herein the allegations contained in paragraph VIII of said first cause of action commencing with the word "that" on line 9, page 4, of this third party complaint and extending to and including the word "earnings" on line 14, page 4, of this third party complaint.

II.

That on or about the 1st day of September, 1948, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insurance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said The Fidelity and Casualty Company of New York at the time that the said third party defendant was acting as the agent and broker of third party plaintiffs; that it was the duty of said third party defendant as agent and broker of third party plaintiffs to notify third party plaintiffs of

the receipt and acceptance by third party defendant of the said policies SPL 20950 and 20968, to disclose to third party plaintiffs as the principals of third party plaintiffs the fact of such receipt and acceptance and particularly to notify said third party plaintiffs that said policies contained provisions for increased premium rates as specified hereinbefore and to disclose said material fact to third party plaintiffs as the principals of third party defendant; that third party defendant concealed from and failed to notify third party plaintiffs of the receipt of said policies and of the increased premium rate contained therein and failed to disclose said facts to third party plaintiffs with intent to induce third party plaintiffs to believe that they continued to be protected and covered by insurance provided by the Fidelity and Casualty Company of New York by the same premiums as were provided for in the policy above mentioned SPL 1457 and particularly at the premium rate 1.223% of the gross earnings of third party plaintiffs and with intent to induce them to continue to forward to The Fidelity and Casualty Company of New York insurance premiums based upon the rate of 1.223% of third party plaintiffs gross earnings; that as the result of the failure of third party defendant to disclose said facts and to notify said third party plaintiffs of said facts, third party plaintiffs have become liable to the said The Fidelity and Casualty Company of New York in the sum of \$7,841.99 together with interest at the rate of 7% from and after October 27, 1947, as premiums due under said poli-

cies SPL 20950 and 20968 according to the allegations in plaintiff's complaint.

As and for a fourth, separate and distinct cause of action third party plaintiffs allege as follows:

I.

Third party plaintiffs refer to paragraphs I to VIII, inclusive, of the first cause of action in this third party complaint and incorporate the same by reference as though fully set forth herein, except that third party plaintiffs do not incorporate herein by reference the allegations in paragraph VIII of said first cause of action commencing with the word "that" on line 1 of page 4 and extending to and including the word "earnings" on line 14 of said page 4 of this third party complaint.

II.

That on or about the 1st day of September, 1946, third party defendant had received from The Fidelity and Casualty Company of New York two certain policies of casualty insurance between The Fidelity and Casualty Company of New York as insurer and third party plaintiffs as the insured, which said policies were numbered SPL 20950 and 20968; that said policies contained provision for an increased premium rate of 2.20% of third party plaintiffs' gross earnings; that said third party defendant had accepted and had not rejected the said policies from the said The Fidelity and Casualty Company of New York at the time that the said third party defendant

was acting as the agent and broker of third party plaintiffs; that third party defendant carelessly and negligently failed, neglected and omitted to notify third party plaintiffs of its receipt or its acceptance of policies SPL 20950 and 20968, and retained same in its possession until August 7, 1947.

III.

That The Fidelity and Casualty Company of New York has asserted a claim against third party plaintiffs in the sum of \$7,841.99 for premiums under said policies; that said claim is the basis of plaintiff's complaint herein; that any liability of third party plaintiffs to said The Fidelity and Casualty Company of New York has been and is the proximate result of the negligence and carelessness of said third party defendant.

Wherefore third party plaintiffs pray that if it be adjudged that third party plaintiffs are liable to the said The Fidelity and Casualty Company of New York in said sum of \$7,841.99 together with interest, as aforesaid or in any other sum, that third party plaintiffs be awarded judgment herein against third party defendant in the same sum, together with their costs of suit and such other relief as the Court may deem proper.

/s/ NORMAN A. EISNER,

/s/ SAMUEL W. WICKLOW,

Attorneys for defendants and
third party plaintiffs.

[Endorsed]: Filed June 18, 1948.

[Title of District Court and Cause.]

ANSWER

Now come defendants California Motor Transport Co., Ltd., a corporation, California Motor Express, Ltd., a corporation, Valley and Coast Transit Company, a corporation, Coast Line Express, a corporation, Sunset Transfer Company, a corporation, Red Line Transfer Company, a co-partnership, James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Martin, co-partners d. b. a. Red Line Transfer Company, James Coughlin d. b. a. Red Line Transfer Company, and answering plaintiff's complaint on file herein admit, deny and allege as follows:

I.

Answering paragraph IV of the first cause of action of plaintiff's complaint defendants deny generally and specifically, each and all of the allegations therein contained.

II.

Answering paragraph VII of the first cause of action of plaintiff's complaint defendants deny generally and specifically, all and singular the allegations therein contained.

III.

Answering paragraph VIII of the first cause of action of plaintiff's complaint the defendants aver that they have no information or belief upon the

subject sufficient to enable them to answer the allegation that plaintiff delivered the policy referred to to Harry R. Cantlen and basing their denial upon that ground, defendants deny generally and specifically said allegation; defendants deny generally and specifically all other allegations in said paragraph VIII.

IV.

Answering the allegations in paragraph IX of the first cause of action of plaintiff's complaint defendants aver that they have no information or belief sufficient to enable them to answer the allegations contained in said paragraph commencing with the word "pursuant" on line 8 page 4 to and including the word "them" on line 10 page 4, and basing their denial on that ground defendants deny generally and specifically, all and singular the allegations contained therein.

Defendants deny generally and specifically the allegation commencing with the word "on" in line 10 page 4 of plaintiff's complaint, extending to and including the word "them" on line 12 of page 4.

V.

Answering paragraph X of plaintiff's first cause of action defendants admit the payment of \$9,131.13 to plaintiff, but in this connection defendants allege that said payment was not made under or pursuant to the policies referred to in said complaint.

Defendants aver that they have no information or belief sufficient to enable them to answer the allegations commencing with the word "subsequent" on

line 17 of page 4 of plaintiff's complaint, and extending to and including the figure "\$15,081.64," on line 22 of said page 4, and basing their denial on that ground defendants deny generally and specifically, all and singular the allegations contained therein.

Defendants deny generally and specifically the averments or words in said paragraph X commencing with the word "leaving" on line 22 of page 4 to and including the word "defendants" on lines 23 and 24 of said page 4.

VI.

Except that defendants admit a demand by plaintiff for payment of \$5,950.51 and a refusal by defendants to pay plaintiffs the said sum, defendants deny generally and specifically, each and all of the allegations contained in paragraph XI of plaintiff's first cause of action, and in this connection defendants deny that there is a balance due, owing and unpaid to plaintiff from defendants in the sum of \$5,950.51, together with interest as alleged, or any lesser sum, or any sum at all.

As a further separate, and affirmative defense to plaintiff's first cause of action defendants allege as follows:

I.

That there was in existence and in effect between the parties plaintiff and defendants a written contract and policy of casualty insurance numbered SPL 1457, between the approximate dates of September 1, 1945, and September 1, 1946; that said

policy of insurance provided for the payment by defendants to plaintiff of a premium rate of 1.223% upon the gross earnings of defendants; that pursuant to said policy, and monthly, and as soon as the gross earnings for each month were ascertained, defendants remitted to plaintiff a report of the gross earnings for each month together with an estimate of the premium based upon the foregoing premium rate 1.223%.

II.

That prior to the apparent expiration date of said policy, to wit, on or about September 1, 1946, defendants received from their agent a binder contract and were informed that the provisions in policy SPL 1457 with particular respect to the aforementioned premium rate would continue in effect pending negotiations between defendants' agent and plaintiff as to the renewal of said policy and as to the adoption by defendants of a retrospective plan of insurance.

III.

That between the period of September 1, 1946, and January 21, 1947, defendants continued to forward to plaintiff their reports of gross earnings and estimated premiums based upon the aforementioned premium rate of 1.223% of gross earnings;

That said reports and checks for premiums filed therewith clearly indicated thereon that the estimated premiums were based upon the aforementioned premium rate; that plaintiff accepted such

reports and the checks in payment of premiums and entirely failed and neglected to advise defendants that it considered or contended that any new policy or premium rate was in effect during such period of September 1, 1946, to January 21, 1947; that defendants continued to remit the said reports and premiums in reliance upon the said acceptance of said premium checks by plaintiff as well as upon the information of their agent as aforesaid; that defendants at no time consented or agreed to any alteration of premium rates; that the first knowledge had by defendants of any claim by plaintiff for increased premiums was had in the month of August, 1947; that had defendants been advised by plaintiff at any time during the period of September 1, 1946, to January 21, 1947, that the premium rate used by defendants in estimating the premiums due to plaintiff was deemed and considered by plaintiff to be incorrect and inadequate under the terms of the policies SPL 20950 and 20968 said defendants would have immediately denied their liability for such premiums or any liability under said last mentioned policies; that the action of plaintiff in accepting the reports and premiums forwarded by defendants, clearly indicating, as aforesaid, the estimation of said premiums on the basis of the premium rates provided for in policy SPL 1457, led and induced defendants to believe that they continued to be protected under the terms of said policy SPL 1457 and to be liable for premiums at the rate provided for in said policy SPL 1457 during the

period of the negotiations alleged in paragraph II above; that the action of plaintiff has estopped plaintiff from asserting at this time that any new premium rate or any premium rate other than that provided in policy No. SPL 1457 was in effect and binding upon defendants during the period September 1, 1946 to January 21, 1947.

Answering the Second Cause of Action in Plaintiff's Complaint These Answering Defendants Admit, Deny and Allege as Follows:

I.

Answering paragraph IV of the first cause of action of plaintiff's complaint, so far as said paragraph is incorporated by reference into and made a part of paragraph I of plaintiff's second cause of action, these answering defendants deny generally and specifically, each and all of the allegations therein contained, except that defendants aver that defendant James C. Coughlin was and is doing business under the name of Red Line Transfer Company, in Los Angeles, California.

II.

Answering paragraph II of the second cause of action in plaintiff's complaint these defendants deny generally and specifically, all and singular the allegations therein contained.

III.

Answering the allegation contained in paragraph

III of plaintiff's second cause of action commencing with the word "thereafter" on line 3 page 6 of plaintiff's complaint and extending to and including the word "Cantlen" on line 4, page 6 of plaintiff's complaint, defendants aver that they have no information or belief upon the subject sufficient to enable them to answer the said allegation and basing their denial upon that ground defendants deny generally and specifically the said allegation; defendants deny generally and specifically, each and all of the other allegations in said paragraph.

IV.

Defendants deny generally and specifically the allegation commencing with the word "at" on line 13 page 6 of plaintiff's complaint to and including the word "them" on line 14 page 6 of plaintiff's complaint.

V.

Defendants aver that they have no information or belief sufficient to enable them to answer the allegations in paragraph V of plaintiff's second cause of action commencing with the word "subsequent" line 16 page 6 of plaintiff's complaint to and including the figure "\$1,891.48" on line 21 page 6 of plaintiff's complaint and basing their denial on that ground deny generally and specifically, all and singular, the allegations therein contained; defendants deny generally and specifically the words contained in said paragraph V commencing with the word "due" on line 21 page 6 and extending to and in-

cluding the word "defendants" on line 21 page 6 of plaintiff's complaint.

VI.

Except that defendants admit a demand upon them for the payment of \$1,891.48 and a refusal by them to pay to plaintiff the said sum defendants deny generally and specifically, each and all of the allegations contained in paragraph VI of the second cause of action of plaintiff's complaint.

As and for a Further Separate and Affirmative Defense to Plaintiff's Second Cause of Action Defendants Allege as Follows:

I.

These answering defendants refer to paragraph I, II and III of their separate and affirmative defense to plaintiff's first cause of action and incorporate the same by reference herein as though fully set forth herein.

Wherefore, defendants pray that they have judgment; that plaintiff take nothing by its complaint and that defendants be hence dismissed with their costs of Court.

/s/ NORMAN A. EISNER,

/s/ SAMUEL W. WICKLOW,

Attorneys for Defendants.

Receipt of Copy Acknowledged.

[Endorsed]: Filed June 22, 1948.

[Title of District Court and Cause.]

ANSWER OF THIRD PARTY DEFENDANT

Comes now Bayly, Martin & Fay, Inc. of California, a corporation, and appearing herein as Third Party Defendant, and answering (1) the Third Party Complaint herein and (2) the original Complaint herein, denies, admits, and alleges as follows:

Answer to First Cause of Action of
Third Party Complaint

I.

Admits the allegations of Section I of the First Cause of Action of the Third Party Complaint herein.

II.

Admits the allegations of Section II of the First Cause of Action of the Third Party Complaint herein.

III.

Admits the allegations of Section III of the First Cause of Action of the Third Party Complaint herein.

IV.

Admits the allegations of Section IV of the First Cause of Action of the Third Party Complaint herein.

V.

Admits the allegation of Section V of the First Cause of Action of the Third Party Complaint herein, but in this connection this answering Third

Party Defendant, Bayly, Martin & Fay, Inc., of California, appears under its true name, the last mentioned one, in place and instead of the name set forth in said Third Party Complaint, to wit, Bayly, Martin & Fay, Inc.

VI.

Admits the allegations of Section VI of the First Cause of Action of the Third Party Complaint herein.

VII.

Admits the allegations of Section VII of the first Cause of Action of the Third Party Complaint, and in this connection Third Party Defendant alleges that "casualty insurance," as herein used, includes Comprehensive, Public Liability, and Property Damage Insurance for and on behalf of Third Party Plaintiffs.

VIII.

Answering Section VIII of the First Cause of Action of the Third Party Complaint, Third Party Defendant admits that there was in existence and in effect between Third Party Plaintiffs and the Fidelity and Casualty Company of New York (sometimes hereinafter referred to as "Fidelity") a certain written contract and policy of casualty insurance numbered SPL-1457 between the approximate dates of September 1, 1945, to September 1, 1946, but in this connection Third Party Defendant alleges that said policy was a Comprehensive Special Public Liability Policy including Comprehensive, Public Liability and Automobile Property Damage Insurance; admits that said policy was obtained by Third

Party Defendant as agent for Third Party Plaintiff; admits that said policy of insurance provided for the payment by Third Party Plaintiff's to Fidelity of a premium rate of 1.223% of and upon the gross earnings of said Third Party Plaintiffs; admits that Third Party Plaintiffs regularly reported their gross earnings and remitted payment of said premium to Third Party Defendant, and in this connection alleges that Third Party Defendant received said premiums in its fiduciary capacity, as provided by law, and that Third Party Defendant, acting in such fiduciary capacity and in no other capacity, remitted said premiums to Fidelity; admits that the Third Party Defendant acted and assumed to act as the agent of Third Party Plaintiffs in all matters pertaining to said insurance; denies that prior to the expiration of the said policy and prior to the 1st day of September, 1946, or at any time, the Third Party Defendant took up with Third Party Plaintiffs the matter of issuance by the Fidelity of a new type of policy designated as a Retrospective Plan of Insurance, in place and instead of their existing insurance and in this connection alleges that Third Party Defendant had for many years, to wit, from 1941 to the date of the matter set forth in the Third Party Complaint, acted as broker and agent for Third Party Plaintiffs in procuring and placing for Third Party Plaintiffs the necessary insurance of the type provided for in said policy No. SPL-1457; alleges that a policy of insurance substantially the same as said policy No. SPL-1457 was so pro-

cured for Third Party Plaintiffs covering the periods from September 1, 1941 to September 1, 1942, from September 1, 1942 to September 1, 1943, from September 1, 1943 to September 1, 1944, from September 1, 1944 to September 1, 1945, from September 1, 1945 to September 1, 1946, and from September 1, 1946 until said policy was cancelled; alleges that as each and every one of said last mentioned policies neared its termination date, Third Party Defendant, acting for and on behalf of Third Party Plaintiffs, and at their instructions, entered into negotiations with the insurance carrier, to wit, the Fidelity and Casualty Company of New York, concerning the premium to be paid by Third Party Plaintiffs for the next ensuing year, but that in each and every year as aforesaid the type of insurance and the provisions of the insurance policies, other than the premium, were substantially the same as the provisions of said policy No. SPL-1457, but that in each case and for each year the amount of the premium was negotiated anew by Third Party Defendant for and on behalf of Third Party Plaintiffs; alleges that prior to September 1, 1946 and prior to the termination of the policy in force from September 1, 1945 to September 1, 1946, Third Party Defendant entered into negotiations for and on behalf of Third Party Plaintiffs concerning the premium to be paid by Third Party Plaintiffs for the next ensuing year, to wit, from September 1, 1946 to September 1, 1947; alleges that said Fidelity made the following proposals to Third Party Defendant, which said proposals said Third Party

Defendants duly and timely reported to Third Party Plaintiffs, to wit, that the same type of policy would be issued as had been issued in previous years, that the rate should be 2.20% of and upon the gross earnings of Third Party Plaintiffs, and that in addition thereto Third Party Plaintiffs should sign a collateral agreement with the insurance company, entitled a Retrospective Agreement, which said Retrospective Agreement provides in substance that the aforesaid premium should be modified to require payment of more or less than 2.20% at the end of the year of insurance in accordance with the loss experience of Third Party Plaintiffs, which said Retrospective Agreement was duly delivered by Third Party Defendant to Third Party Plaintiffs and is now either in the possession of Third Party Plaintiffs or in the possession of plaintiff Fidelity and Casualty Company of New York; denies that prior to the 1st day of September, 1946, and on or about the 27th day of August, 1946, or at any time, Third Party Defendant delivered and forwarded to Third Party Plaintiffs a certain Contract of Binder, and in this connection Third Party Defendant alleges that on or about August 27, 1946, the said Fidelity, at the request of Third Party Plaintiffs and Third Party Defendant, duly issued its Contract of Binder, effective for a sixty day period from September 1, 1946, and delivered the same to Third Party Defendant as agent of Third Party Plaintiffs, and thereupon Third Party Defendant delivered the same to its principals, the Third Party Plaintiffs, and said binder is now in the possession of Third

Party Plaintiffs and its contents known thereto; denies that in connection therewith, or in any connection, Third Party Defendant represented to Third Party Plaintiffs, or to any one, pending the negotiations upon the new plan of insurance above mentioned, or pending any negotiations, or at all, that the Third Party Plaintiffs would continue to be covered by insurance provided by the Fidelity under and by virtue of the aforementioned binder contract upon the same terms as were provided for in the aforementioned policy No. SPL-1457, and particularly at the same premium rate of 1.223% of the gross earnings of Third Party Plaintiffs, and in this connection Third Party Defendant alleges that at all times herein mentioned Third Party Plaintiffs knew that it was necessary for Third Party Defendant to negotiate and that Third Party Defendant was negotiating for a premium rate for the ensuing year and further knew that the proposal made by Fidelity, as aforesaid, was for a higher premium rate than for the preceding year, as aforesaid, and further knew that the sole and only reason that the policy had not been duly issued for the ensuing year, to wit, September 1, 1946 to September 1, 1947, was the proposal and demand of the Fidelity for a higher rate and for the signing of the said Retrospective Agreement by Third Party Plaintiffs; denies that said representations or any representations were made to Third Party Plaintiffs, or anyone, by Third Party Defendant with the intent to induce Third Party Plaintiffs to rely thereon, or with any intent to induce them to continue forwarding to Fidelity

via Third Party Defendant, or in any way, premiums based upon the premium rate of 1.223%, or any premium rate, of the Third Party Plaintiffs' gross earnings or to induce them at all.

IX.

Denies the allegation in Section IX of the First Cause of Action of the Third Party Complaint that the Third Party Plaintiffs did in fact rely upon the representations so made by Third Party Defendant, or any representations; admits that Third Party Plaintiffs did during the aforementioned negotiations continue to forward monthly to Fidelity via Third Party Defendant its gross earning reports, estimated premiums, and premium payments, all of the foregoing based upon the premium rate of 1.223% of Third Party Plaintiffs' gross earnings, but in this connection alleges that under and by virtue of the provisions of said policy No. SPL-1457, which said policy is now in the possession of Third Party Plaintiffs and its contents well known to them, the payments made and to be made by Third Party Plaintiffs to Fidelity were subject to subsequent audit by Fidelity to insure that the entire gross earnings of Third Party Plaintiffs had been reported to said last mentioned company and the proper percentage of said gross earnings duly paid thereon and Third Party Defendant was not required by the terms of its agreement with Third Party Plaintiffs or by operation of law to do anything other than to transmit said money so turned over to Third Party Defendant by Third Party

Plaintiffs to Fidelity without any audit by Third Party Defendant; denies that the representations made by the Third Party Defendant to the Third Party Plaintiffs, or any representations, were false and untrue; denies that Third Party Defendant knew at the time it made such representations, or at any time, or any representation, that said representations were in fact false and untrue; denies that on or about the 1st day of September, 1946, Third Party Defendant had received from Fidelity two certain policies of casualty insurance by Fidelity and Casualty Company of New York, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that Third Party Defendant received said policies on or about the 1st day of October, 1946, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contain provision for an increased premium rate of 2.20% of Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to wit,

2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from Fidelity at the time that Third Party Defendant was acting as the agent and broker of Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by law, and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligation of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid.

X.

Admits all of the allegations of Section X of the First Cause of Action of the Third Party Complaint except Third Party Defendant denies that any liability of Third Party Plaintiffs under this claim is the result of and was caused by the misrepresentations of Third Party Defendant as aforesaid, or any misrepresentations of Third Party Defendant at all.

Answer to Second Cause of Action of
Third Party Complaint

I.

Third Party Defendant incorporates herein by reference and makes a part hereof as though fully set forth herein its admissions, denials and allegations set forth in Paragraphs I-VIII, inclusive, and Paragraph X of Third Party Defendant's hereinbefore set forth Answer to First Cause of Action of Third Party Complaint.

II.

Denies the allegation in Section II of the Second Cause of Action of the Third Party Complaint herein that the representations and suggestions so made by Third Party Defendant to Third Party Plaintiffs, or any representations and suggestions made by Third Party Defendant to Third Party Plaintiffs, or any representations and suggestions, were false and untrue; denies that Third Party Defendant in making such representations and suggestions or any representations or suggestions, had no reasonable ground for believing them to be true; admits that on or about the 1st day of October, 1946, Third Party Defendant had received from Fidelity two said policies of casualty insurance between Fidelity, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly

and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contained provisions for an increased premium rate of 2.20% of Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs, as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to wit 2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from the said Fidelity at the time that the said Third Party Defendant was acting as the agent and broker of Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by

law and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligations of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid; denies that Third Party Plaintiffs relied upon the representations and suggestions so made by Third Party Defendant, or any representations and suggestions so made, or any representations and suggestions, and continued to forward to Third Party Plaintiffs premiums based upon the premium rate of 1.223% or any premium rate of their gross earnings.

Answer to Third Cause of Action of
Third Party Complaint

I.

Third Party Defendant refers to Paragraphs I to VIII, inclusive, and Paragraph X of its Answer to the First Cause of Action of Third Party Complaint herein and incorporates its admissions, denials and allegations in said paragraphs by reference as though fully set forth herein, except that Third Party Defendant does not incorporate by reference and does not make a part herein the admissions, denials and allegations contained in its answer to that portion of Paragraph VIII of said First Cause of Action commencing with the word "that" on line 9, page 4, of said Third Party Complaint, and extending to and including the word: "earnings" on line 14, page 4, of said Third Party Complaint.

II.

Admits the allegation in Section II of said Third Cause of Action of the Third Party Complaint herein that on or about the 1st day of October, 1946, Third Party Defendant had received from Fidelity two certain policies of casualty insurance between Fidelity, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contained provisions for increased premium rate of 2.20% of the Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to-wit. 2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from the said Fidelity at the time that the said Third Party Defendant was acting as the agent and broker of said

Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by law, and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligation of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid; admits that it was the duty of said Third Party Defendant as agent and broker of Third Party Plaintiffs to notify Third Party Plaintiffs of the receipt and acceptance by Third Party Defendant of said Policies SPL-20950 and SPL-20968 and to disclose to Third Party Plaintiffs, as the principal of Third Party Defendant, the fact of receipt and acceptance and particularly to notify said Third Party Plaintiffs that said policies contained provisions for increased premium rates as specified hereinbefore and to disclose said material fact to Third Party Plaintiffs as the principals of Third Party Defendant, and in this connection said Third Party Defendant alleges that it duly and timely performed said last mentioned duties and further alleges that at all times herein mentioned Third

Party Plaintiffs well knew that the only reason that the policies for the previous year had not been automatically renewed for the year commencing September 1, 1946, was that Fidelity was proposing and demanding an increased premium rate over the previous year and was proposing and demanding the signing of the Retrospective Agreement and further well knew that any and all insurance coverage negotiated by Third Party Defendant with Fidelity, which said coverage was required of Third Party Plaintiffs by law, must be at a premium rate higher than the preceding year and well knew said premium rate, to-wit, 2.20% of Third Party Plaintiffs' gross earnings; denies that Third Party Defendant concealed from and failed to notify Third Party Plaintiffs, or anyone, of the receipt of said policies and of the increased premium rate or any premium rate contained therein, and failed to disclose said facts, or any facts, to Third Party Plaintiffs with intent to induce Third Party Plaintiffs to believe that they continued to be protected and covered by insurance provided by Fidelity by the same premiums as were provided for in the policy above mentioned, SPL-1457, and particularly at the premium rate of 1.223% or any premium rate of the gross earnings of Third Party Plaintiffs, or with any intent, and with intent to induce them to forward to Fidelity insurance premiums based upon the rate of 1.223% or any premium rate of Third Party Plaintiffs' gross earnings, or any intent; denies that as the result of the failure of Third Party Defendant to disclose said facts, or any fact, or to notify said Third Party Plaintiffs of said facts, or any facts,

Third Party Plaintiffs have become liable to the Fidelity and Casualty Company of New York in the sum of \$7,841.99 or any sum, together with interest at the rate of seven per cent from and after October 27, 1947, as premiums due under said Policies SPL-20950 and SPL-20968, according to the allegations in Plaintiff's Complaint.

Answer to Fourth Cause of Action of
Third Party Complaint

I.

Third Party Defendant refers to Paragraph I to VIII, inclusive, of its Answer to the First Cause of Action of Third Party Complaint herein and incorporates its admissions, denials and allegations in said paragraphs by reference as though fully set forth herein, except that Third Party Defendant does not incorporate by reference and does not make a part hereof the admissions, denials, and allegations contained in its answer to that portion of Paragraph VIII of said First Cause of Action commencing with the word "that" on line 1, page 4, of said Third Party Complaint, and extending to and including the word "earnings" on line 14, page 4, of said Third Party Complaint.

II.

Admits the allegations of Section II of the Fourth Cause of Action of the Third Party Complaint herein that on or about the 1st day of October, 1946, Third Party Defendant had received from

Fidelity two certain policies of casualty insurance between Fidelity, as insurer, and Third Party Plaintiffs, as the insured, which said policies were numbered SPL-20950 and SPL-20968, and in this connection alleges that the receipt thereof and the contents thereof by Third Party Defendant was duly and timely reported to Third Party Plaintiffs by Third Party Defendant; admits that said policies contained provisions for an increased premium rate of 2.20% of Third Party Plaintiffs' gross earnings, and in this connection alleges that the aforesaid Retrospective Agreement was at the same time received by Third Party Defendant and on or about the same time delivered to Third Party Plaintiffs as aforesaid, and Third Party Plaintiffs at all times herein mentioned knew that the insurance coverage offered and issued by Fidelity for the year in question would contain and contained a premium rate higher than the premium rate of the preceding year, to-wit, 2.20% of Third Party Plaintiffs' gross earnings, and further knew that said Retrospective Agreement affected said premium rate as aforesaid; admits that said Third Party Defendant had accepted and had not rejected the said policies from Fidelity at the time that the said Third Party Defendant was acting as the agent and broker of Third Party Plaintiffs, and in this connection alleges that at all times herein mentioned Third Party Defendant had acted as insurance agent and broker for Third Party Plaintiffs in handling of all Third Party Plaintiffs' insurance matters, and further alleges that Third Party Plaintiffs well knew that they were required by law to have their operations

covered by insurance and that if Third Party Defendant had not accepted said policies as aforesaid, then in that event Third Party Plaintiffs would have been without insurance as required by law and further alleges that under the terms of the agreement and understanding between Third Party Defendant and Third Party Plaintiffs, it was the duty and obligation of Third Party Defendant to see to it that Third Party Plaintiffs were insured as aforesaid; denies that Third Party Defendant carelessly and negligently, or in any way, failed, neglected and omitted to notify Third Party Plaintiffs or anyone of its receipt or its acceptance of Policies Nos. SPL-20950 and SPL-20968, and retained the same in its possession until August 7, 1947.

III.

Admits all of the allegations of Section III of the Fourth Cause of Action of the Third Party Complaint herein, save and except that Third Party Defendant denies the liability, or any liability, of Third Party Plaintiffs to Fidelity has been and is the proximate result of any negligence or carelessness or any actions of said Third Party Defendant, or at all.

Answer to First Cause of Action of Complaint of Plaintiff

I.

Third Party Defendant admits the allegations of Sections I, II, III, IV, V, VI, and VII of the First Cause of Action of Plaintiff's Complaint on file herein.

II.

Admits the allegations of Paragraph VIII of the First Cause of Action of Plaintiff's Complaint on file herein, save and except the policies herein referred to were delivered to Third Party Defendant as agent of Third Party Plaintiffs.

III.

Third Party Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Sections IX, X and XI of the First Cause of Action of Plaintiff's Complaint on file herein, and basing its denial upon such lack of knowledge or information, denies each and every, all and singular the allegations of said last mentioned sections.

Answer to Second Cause of Action
of Plaintiff's Complaint

I.

Third Party Defendant refers to its admissions, denials and allegations to Paragraphs I to VI, inclusive, of the First Cause of Action of Plaintiff's Complaint on file herein and by this reference incorporates all of said admissions, denials and allegations in this its answer to the Second Cause of Action to Plaintiff's Complaint on file herein.

II.

Admits the allegations of Section II of the Second Cause of Action of Plaintiff's Complaint on file herein.

III.

Admits the allegations of Section III of the Second Cause of Action of Plaintiff's Complaint on file herein, save and except Third Party Defendant alleges that the policies in question were delivered to it as agent for Third Party Plaintiffs.

IV.

Third Party Defendant is without knowledge or information sufficient to form a belief as to the truth of the averments in Sections IV, V, and VI of the Second Cause of Action of Plaintiff's Complaint on file herein, and basing its denial upon such lack of knowledge or information, denies each and every, all and singular the allegations of said last mentioned sections.

Wherefore, Third Party Defendant prays that it be dismissed hence without judgment rendered against it, for judgment or costs of suit against the Third Party Plaintiffs, and for such other and further relief as is meet and proper in the premises.

Dated: July 23, 1948.

/s/ ORLA ST. CLAIR,

/s/ ARTHUR H. CONNOLLY, JR.,

/s/ ST. CLAIR & CONNOLLY,

Attorneys for Third Party
Defendant.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1948.

In the District Court of the United States for the
Northern District of California, Southern
Division

No. 28049

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
a Corporation, et al.,

Defendants and Third
Party Plaintiffs,

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,
Third Party Defendant.

DAN HADSELL, ESQ.,
JOE G. SWEET, ESQ.,
EVERETT A. INGALLS, ESQ.,
SYDNEY P. MURMAN,

405 Montgomery Street,
San Francisco 4, California,
Attorneys for plaintiff.

NORMAN A. EISNER, ESQ.,
SAMUEL W. WICKLOW, ESQ.,
Mills Building,
San Francisco 4, California,
Attorneys for defendants.

Erskine, District Judge

MEMORANDUM OPINION

The evidence does not sustain defendants' contention that there was an oral extension of the binder. Both Cantlen, defendants agent, and Mettalia, one of plaintiff's officials, say there was no such agreement. Accordingly there is no basis for the contention that the rates provided for by the policy which expired September 1, 1946, were applicable from that date to the effective date of the cancellation of the insurance. Thus the sole question, insofar as plaintiff's claim against defendants is concerned, is whether or not there was an insurance in effect which superseded the binder up to said effective cancellation date. In short, the point to be determined as far as plaintiff and defendants are concerned is whether or not there was an effective issuance and delivery of the policies which made them binding upon the plaintiff and defendants. There is no doubt that the policies were made out and delivered to the agent of the insured within the sixty-day period provided in the binder. There is no doubt that the plaintiff considered them in effect. This is shown not only by the testimony of its officials, but by the fact that it did not cancel the filings with the Railroad Commission of California and the Interstate Commerce Commission, and that it defended claims made against the defendants. In short it treated and intended the issuance and delivery of its insurance policies to defendants as effective and binding upon it, even though it had not secured from defendants the retrospective agreement which it was demanding.

While the defendants' agent Cantlen testified at one time that he did not regard the transaction as complete until the retrospective agreement was signed, he also testified that he considered his principal covered by these policies, and his conduct shows that he thought that such was the situation. He received a claim against the defendants shortly after the delivery of these policies to him, and sent it to the plaintiff for defense with a covering memorandum referring to these policies by their numbers. A short time later, in November, 1946, he advised the American Manganese Company, a customer of the plaintiff, by letter to the effect that defendants were covered by insurance up to September 1, 1947, which was the expiration date of these policies. He sent a copy of this letter to the defendants. He sent to plaintiff voluntary audits with specific reference to these policies. It will serve no purpose to review every item of evidence indicating that both plaintiff and defendants' agent Cantlen considered that these policies were in effect and superseded the binder. It will suffice to say that they compel the conclusion that these policies became effective even though the retrospective agreement was not executed. Accordingly I so find, and therefore find that the plaintiff is entitled to recover from defendants the amount of its claim, \$7841.99, together with legal interest thereon from October 22nd, 1947.

The fact that no deposit premium was paid and that plaintiff received premiums based upon the old rates are not, under the circumstances, inconsistent with the fact that these policies were then in effect.

This brings us to the controversy between the defendants and the third party defendant. According to the pleadings the defendants claim that their agent (the third party defendant) should pay any judgment obtained by plaintiff against defendants because (1) said agent advised defendants that the binder covered defendants until the negotiations respecting the new rates had been completed, and (2) the agent received and accepted the policies without telling defendants and in violation of defendants' instructions.

I find under the evidence that defendants' claim that they thought that the binder covered them until negotiations were completed is not supported by the evidence. Their chief official had the binder delivered to him. He says he did not read it. This binder provided that it would expire in sixty days and that when the policies were issued they would supersede the binder. This is so explicit in the binder that it is impossible for me to find that defendants could have believed that the binder was in effect after the sixty-day period. Insofar as their other claim against the third party defendant is concerned, I find that it is not supported by the evidence. They knew, or should have known, of the delivery of these policies to their agent. Cantlen says he told Coughlin that he had them, but whether he did or not makes no difference because the documentary evidence and the circumstances show that defendants knew, or should have known they were covered not by the binder, but by the policies. I will not attempt to refer to all of the facts and circumstances and docu-

ments supporting this conclusion, but will cite some of them. Coughlin, the defendants' chief executive, was very experienced in this line of business, and he knew that these defendants could not operate unless they had insurance, and therefore must have inquired and known that these policies had been issued. As heretofore stated, a copy of Cantlen's letter to the American Manganese Company was sent by him to defendants in November, 1946, which clearly showed that the policies were in force. Defendants required plaintiff to defend claims made against them for accidents occurring up to the effective cancellation date, even though some of these claims were not filed until after the defendants had in April, 1947 rejected plaintiff's claim for premiums figured upon the rates fixed by the policies. Defendants' secretary signed a gross receipt statement designating that it referred to one of these policies. These and other facts and circumstances brought out by the evidence support the conclusion that the defendants knew, or should have known that the binder expired at the end of sixty days; that the policies had been issued, delivered, and were effective; that they had superseded the binder; and that the rates provided for by them were controlling until a retrospective agreement was signed, or the policies were cancelled.

In view of the foregoing, judgment will be rendered in favor of plaintiff and against defendants in the sum of \$7841.99, together with legal interest thereon from October 22, 1947, to the date of such judgment, and against the defendants and in favor

of the third party defendant, when appropriate findings of fact and conclusions of law, and judgment in pursuance thereof are signed and filed.

Dated: June 14th, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

[Endorsed]: Filed June 15, 1950.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable Herbert W. Erskine presiding, on September 30 and October 10, 11 and 17, 1947, Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman appearing as counsel for the plaintiff, Messrs. Norman A. Eisner and Samuel W. Wicklow appearing as counsel for defendants and third party plaintiffs, and Orla St. Clair, Esq., of St. Clair and Connolly appearing as counsel for third party defendant, said cause being tried by the Court sitting without a jury, upon plaintiff's complaint, the answer and third party complaint of defendants and third party plaintiffs, and the answer of the third party defendant.

Thereupon witnesses were called by the respective parties and evidence, both oral and documentary,

was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. Briefs having been filed, said cause was duly ordered submitted for decision and judgment.

Wherefore, by reason of the premises, and having duly considered the law and the evidence, and having made and filed its memorandum opinion in said cause, the Court now makes the following

FINDINGS OF FACT

(1) All of the allegations of plaintiff's complaint are true and correct.

(2) All of the allegations of third party plaintiffs' complaint as denied by third party defendant are untrue and incorrect.

(3) All of the allegations of third party defendant's answer are true and correct.

(4) At all times mentioned in said complaint, plaintiff was a corporation organized and existing under and by virtue of the laws of the State of New York and licensed to transact and transacting a general casualty insurance business in California.

(5) At all times mentioned in said complaint defendants and third party plaintiffs, California Motor Transport Co., Ltd., California Motor Express, Ltd., Valley and Coast Transit Company, Coast Line Express, and Sunset Transfer Company were corporations, and each of them was a corpora-

tion, organized and existing under and by virtue of the laws of California and engaged in the business of highway carriers in California.

(6) At all times mentioned in said complaint defendants and third party plaintiffs James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Martin were citizens and residents of California and copartners doing business under the fictitious name and style of Red Line Transfer Company as the sole owners of said business.

(7) At all times mentioned in said complaint defendant and third party plaintiff James C. Coughlin, a citizen, and resident of California, was doing business under the fictitious name and style of Red Line Transfer Company as the sole owner of said business, in Los Angeles, California.

(8) At all times mentioned in said third party complaint, third party defendant Bayly, Martin & Fay, Inc., also known as Bayly, Martin & Fay, Inc. of California, was and is a corporation duly organized and existing under and by virtue of the laws of the State of California and having a license to act, and acting in said state as an insurance broker.

(9) At all times mentioned in said third party complaint, said third party defendant was the duly appointed and acting, and was acting as agent and broker for the placing and maintenance of casualty insurance, including comprehensive, public liability

and property damage insurance, for and on behalf of defendants and third party plaintiffs.

(10) The matter in controversy exceeds, exclusive of interest and costs, the sum of \$3,000.00.

(11) On or about September 1, 1946, at the request of defendants and third party plaintiffs, and each of them, in San Francisco, California, plaintiff made, executed and issued to said defendants and third party plaintiffs its written contract of primary casualty insurance known as "Comprehensive General—Automobile," Policy No. SPL 20968, which said policy was filed with the Railroad Commission of California, Transportation Department, Truck and Stage Division, wherein and whereby plaintiff insured defendants and third party plaintiffs, and each of them, for one year against bodily injuries, with limits of liability of \$10,000.00 each person and \$20,000.00 each accident, and property damage, with limits of liability of \$5,000.00 each accident, as arising out of the ownership, maintenance and use of certain automobiles and trucks by defendants and third party plaintiffs, and each of them, in their business, at the premium rate of \$2.00 per \$100.00 of gross earnings of each of said defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

(12) Also at the request of said defendants and third party plaintiffs, and each of them, plaintiff

then and there made, executed and issued to said defendants and third party plaintiffs its written contract of casualty insurance known as "Comprehensive General—Automobile," Policy No. SPL 20950, which said policy was issued solely as excess insurance over the primary insurance provided for in said Policy No. SPL 20968, insuring said defendants and third party plaintiffs, and each of them, for one year against bodily injury, with limits of liability of \$100,000.00 each person and \$300,000.00 each accident, and property damage, with limits of liability of \$5,000.00 each accident as arising out of the ownership, maintenance and use of said automobiles and trucks by said defendants and third party plaintiffs, and each of them, in their business, all in excess of said primary coverage afforded by said Policy No. SPL 20968, and at the premium rate of \$.20 per \$100.00 of gross earnings of each of said defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

(13) Thereafter plaintiff delivered said policies to third party defendant, the agent of defendants and third party plaintiffs, and each of them, following which said defendants and third party plaintiffs reported claims and lawsuits under said policies to plaintiff, and pursuant to voluntary audit each month of said defendants and third party plaintiffs, said defendants and third party plaintiffs remitted

monthly premium payments to plaintiff, said payments being received by plaintiff on account of the total earned permium and subject to final audit by plaintiff at said rates at the end of said period of said policies.

(14) On or about December 19, 1946, plaintiff, pursuant to the terms of said policies, caused written notices of cancellation of said policies to be mailed to defendants and third party plaintiffs, and each of them, at the address shown on said policies, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947. Pursuant to law, and on or about December 20, 1946, plaintiff notified said Railroad Commission of said notice of cancellation to defendants and third party plaintiffs, and each of them, of said Policy No. SPL 20968. On January 21, 1947, said policies were cancelled in accordance with said notices, and each of them.

(15) Prior to said cancellation, and in accordance with said voluntary monthly audits made by defendants and third party plaintiffs, and each of them, defendants and third party plaintiffs paid to plaintiff the total sum of \$9,131.13 on account of the total earned premium of said Policy No. SPL 20968 for the period from September 1, 1946, to January 21, 1947.

(16) Subsequent to said cancellation, and as soon as possible thereafter, plaintiff caused the total earned premiums on said policies for the period

from September 1, 1946, to January 21, 1947, to be computed by final audit at said rates totaling \$2.20 per \$100.00 of gross earnings of defendants and third party plaintiffs, said premiums so computed being in the total sum of \$16,973.12, leaving an unpaid balance of said total earned premiums in the sum of \$7,841.99 due plaintiff from defendants and third party plaintiffs, and each of them.

(17) On October 27, 1949, plaintiff made demand on defendants and third party plaintiffs, and each of them, for said unpaid balance, and no part of said unpaid balance of said total earned premiums due plaintiff has been paid by said defendants and third party plaintiffs.

(18) Third party defendants at no time, or at all, represented to defendants and third party plaintiffs that a certain binder made, executed and issued by plaintiff on or about August 27, 1946, to defendants and third party plaintiffs and delivered by third party defendant to defendants and third party plaintiffs covered said defendants and third party plaintiffs until negotiations respecting the aforesaid policies had been completed, and in this connection third party defendant at no time made representations to defendants and third party plaintiffs that were false and untrue or that third party defendant had reasonable ground for not believing to be true.

(19) Third party defendant received and accepted the aforesaid policies from plaintiff with the knowledge of and in accordance with the in-

structions of said defendant and third party plaintiffs, and each of them, and in this connection third party defendant at no time concealed from and failed to notify defendants and third party plaintiffs of the receipt of said policies from plaintiff, nor did third party defendant prior to August 7, 1947, negligently fail, neglect and omit to notify said defendants and third party plaintiffs, and each of them, of the receipt of said policies and the retaining of the same in the possession of the third party defendant.

From the foregoing findings of fact, the Court makes the following

Conclusions of Law

(1) There is now due, owing and unpaid to plaintiff from defendants and third party plaintiffs, and each of them, the total sum of \$7,841.99, together with interest at the rate of 7% per annum from and after October 27, 1947.

(2) Plaintiff is entitled to recover from defendants the sum of \$7,841.99, together with interest thereon at the rate of 7% per annum from October 27, 1947.

(3) Third party plaintiffs shall have and recover nothing from third party defendant.

(4) Plaintiff and third party defendant are entitled to recover their respective costs of suit herein from defendants and third party plaintiffs.

Let an appropriate judgment be entered upon these findings of fact and conclusions of law.

Dated this 25th day of September, 1950.

/s/ HERBERT W. ERSKINE,
United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed September 25, 1950.

In the District Court of the United States, for the
Northern District of California, Southern Division

No. 28049

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO.,
LTD., a Corporation, et al,

Defendants and Third
Party Plaintiffs.

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,
Third Party Defendant.

JUDGMENT

The above-entitled cause came on regularly for trial before the above-entitled Court, Honorable

Herbert W. Erskine presiding, on September 30, October 10, 11 and 17, 1949, Sydney P. Murman, Esq., of Hadsell, Sweet, Ingalls & Murman, appearing as counsel for plaintiff, Messrs. Norman A. Eisner and Samuel W. Wicklow appearing as counsel for defendants and third party plaintiffs, and Orla St. Clair, Esq., of St. Clair and Connolly appearing as counsel for third party defendant, said cause being tried by the Court sitting without a jury, upon plaintiff's complaint, the answer and third party complaint of defendants and third party plaintiffs, and the answer of the third party defendant.

Thereupon witnesses were called by the respective parties and evidence, both oral and documentary, was by the respective parties presented to and received by the Court. Upon conclusion of the trial of said cause, the same was by the Court ordered to be briefed by counsel for the respective parties. Briefs having been filed, said cause was duly ordered submitted for decision thereafter rendered on June 15, 1950.

Now, Therefore, by virtue of the law, and by reason of the findings of fact and conclusions of law heretofore made and filed by the above-entitled Court on September 25, 1950, It Is Ordered. Adjudged and Decreed that plaintiff have and recover of and from defendants the sum of Seven Thousand Eight Hundred Forty-one and 99/100 Dollars (\$7,841.99), together with interest thereon at the rate of seven per cent (7%) per annum from October 27, 1947.

It Is Further Ordered, Adjudged and Decreed that third party plaintiffs shall have and recover nothing from third party defendants.

It Is Further Ordered, Adjudged and Decreed that plaintiff and third party defendant have and recover of and from defendants and third party plaintiffs their respective costs of suit herein, taxed in the sum of \$49.70 as to plaintiffs and in the sum of \$20.00 as to third party defendant.

Dated this 4th day of October, 1950.

/s/ HERBERT W. ERSKINE,
Judge U. S. District Court.

Lodged September 28, 1950.

[Endorsed]: Filed October 4, 1950.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF APPEALS FOR NINTH CIRCUIT

Notice is hereby given that California Motor Transport Co., Ltd., a corporation, California Motor Express. Ltd., a corporation, Valley and Coast Transit Company, Coast Line Express, a corporation, Sunset Transfer Company, a corporation, Red Line Transfer Company, a co-partnership, James C. Coughlin, William Coughlin, Joseph Coughlin, Warren Coughlin and Rose Morton, co-partners d.b.a. Red Line Transfer Company, James Coughlin

d.b.a. Red Line Transfer Company, Defendants and Third Party Plaintiffs, above named, hereby appeal to the Court of Appeals for the Ninth Circuit, from the Final Judgment entered in this action on October 5, 1950, and the whole thereof.

Dated: October 17th, 1950.

/s/ NORMAN A. EISNER,
Attorney for Defendants
And Appellants.

[Endorsed]: Filed October 17, 1950.

[Title of District Court and Cause.]

APPELLANTS DESIGNATION OF RECORD,
PROCEEDINGS AND EVIDENCE TO BE
CONTAINED IN THE RECORD ON AP-
PEAL

Appellants, Defendants and Third Party Plaintiffs in the above-entitled action, designate the following portions of the record, proceedings and evidence to be contained in the record on appeal in the above-entitled action:

1. The Complaint.
2. The Answer.
3. The Third Party Complaint.
4. The Order granting motion to bring in third party defendant.
5. The answer of third party defendant.

6. The complete Reporter's Transcript of all the oral proceedings before the Trial Court, including the testimony of all witnesses, objections and arguments of counsel and rulings of the Court.

7. The Opinion of the Trial Court.

8. Plaintiffs' exhibits 1-20 inclusive, defendants exhibits A-N inclusive, Third party defendants exhibits AA-SS-4 inclusive.

9. The findings of fact and conclusions of law.

10. The Judgment.

11. The Notice of Appeal with date of filing.

12. This designation.

13. All other documents making up the judgment roll in this action.

/s/ NORMAN A. EISNER,
Attorney for Defendants
And Appellants.

[Endorsed]: Filed October 17, 1950.

In the Southern Division of the United States
District Court for the Northern District of
California

Before: Hon. Herbert W. Erskine,
Judge.

No. 28049-H

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK,

Plaintiff,

vs.

CALIFORNIA MOTOR TRANSPORT CO.,
LTD., a Corporation; CALIFORNIA MOTOR
EXPRESS, LTD., a Corporation; VALLEY
AND COAST TRANSIT COMPANY, COAST
LINE EXPRESS, a Corporation; SUNSET
TRANSFER COMPANY, a Corporation; RED
LINE TRANSFER COMPANY, a Co-partner-
ship; JAMES C. COUGHLIN, WILLIAM
COUGHLIN, JOSEPH COUGHLIN, WAR-
REN COUGHLIN and ROSE MORTON, Co-
partners, d.b.a. RED LINE TRANSFER
COMPANY, JAMES COUGHLIN d.b.a. RED
LINE TRANSFER COMPANY,

Defendants and Third
Party Plaintiffs,

vs.

BAYLY, MARTIN & FAY, INC., a Corporation,
Third Party Defendants.

REPORTER'S TRANSCRIPT

Appearances:

For Plaintiff:

SIDNEY MURMAN, ESQ.

For Defendants and Third Party Plaintiffs:

NORMAN EISNER, ESQ.

For Third Party Defendants:

ORLA ST. CLAIR, ESQ.

Friday, September 30, 1949—10 A.M.

The Clerk: Fidelity and Casualty Company v. California Motor Express Company, for trial.

Mr. Murman: Ready.

Mr. Eisner: Ready.

Mr. St. Clair: Ready.

Mr. Murman: If the Court please, I am Mr. Murman and I represent Fidelity and Casualty Company, the plaintiff in this action. This is an action which on its face might appear to be a bit complicated at the outset, your Honor, for the reason that there is a complaint filed, then an answer filed to the complaint, then a third party complaint filed, an answer filed to that complaint.

The Court: As I understand it—as I read the pleadings over very quickly this morning, I understand the claim by the plaintiff is for premiums on insurance.

Mr. Murman: Additional premiums, your Honor.

The Court: The claim of the defendant and the third party plaintiff is to the effect that there is an agency, the third party defendant, that is responsible for it.

Mr. Murman: That is correct, your Honor. The defendant in this case has, as I understand, by the third party complaint brought action against the broker.

The Court: Yes, the broker is charged with not telling [2*] them about the increase in the rate and about the insurance policy.

Mr. Murman: That is the gist of it.

The Court: \$2.20 from \$1.20, I think.

Mr. Murman: Something like that. \$1.22 to \$2.20. We expect to show, your Honor, that the insurance was issued and delivered and that claims were rendered under it which were paid by the company; that, as a matter of fact, almost a year following the issuance of the insurance, and following the dispute having arisen, the insured referred a lawsuit to the company for defense, which suit was successfully defended on behalf of the assured.

Our position is that the contract is a binding agreement between the parties; that if there was lack of knowledge on the part of the assured at the outset, that that lack of knowledge was sufficiently brought to the attention of the assured and the contract was approved, ratified by the subsequent action of the assured in referring the matter to the company for defense which arose during the policy period.

Mr. Eisner, did you bring the original policy?

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Eisner: I did.

Mr. Murman: May I have it at this time?

Mr. Eisner: Have you finished your statement, Mr. Murman? I would like to make a statement as to matters on defense. [3]

Mr. Murman: Yes.

The Court: Yes, you can either make it now or reserve it.

Mr. Eisner: I want to make one statement. The claim—I think, your Honor, has grasped them, but the defendants deny liability to the plaintiff on the ground that these policies were never issued, never came into evidence, and that during the period from September 1, 1946, until January, 1947, the defendant and third-party plaintiff was covered by a binder during that period continuing in effect the policy that was in existence during the preceding year, in other words, the policy from September 1, 1945, to September 1, 1946, and that during the interval from September 1, 1946, until January, 1947, there were negotiations going on for policies, but that these policies never came into existence and that a binder covered the parties during that interval and carried over on the former policy at the preceding rate.

Then there is the defense of waiver and estoppel as against the plaintiff because from September 1, 1946, until January, 1947, after these policies were terminated, the third-party plaintiff and defendant continued to make and render monthly statements and reports and made monthly remittances to the

plaintiff in the action through their collection agency, the Bayly, Martin & Fay, and in these monthly reports the premium was set forth and detailed at the rate set forth in the former policy, No. 1457, which is the former policy; [4] and remittances were made on that basis, which were accepted, retained, never protested, and it wasn't until approximately August, 1947, eight months after the acknowledged termination of the claimed policy before any claim was made by the plaintiff in the action, through the third-party defendant or otherwise, that there wasn't a correct remittance and that the premiums had not been correctly calculated.

And then there is, as your Honor intimated, a third party, the broker for the insurance, because if these policies ever came into existence the broker did not disclose the information, did not deliver the policies to the insured, delivered to the insured a binder, and who was led to believe that the binder covered during the interval and during the period that the negotiations were going on and during the period, as will develop, that the plaintiff wanted a new kind of insurance agreement signed, which they refer to as a retrospective agreement.

I think that is a brief statement of our position and the rest will be developed in the evidence.

Mr. St. Clair: I represent the broker, the third-party defendant. My pleadings are extensive and in detail, and I prefer to hold my statement until we can proceed with our defense.

Mr. Murman: May I have the policies now, Mr. Eisner?

Mr. Eisner: Which ones do you want? [5]

Mr. Murman: The two I demanded, SPL-20968 and SPL-20950. While Mr. Eisner is getting the policies, there is a primary policy issued which, oddly enough, bears No. 20968, and the later number, the excess policy, bears No. 20950.

The Court: I noticed that in the pleadings.

Mr. Murman: Mr. Mettalia, will you take the witness stand, please.

CHARLES A. METTALIA

called for the plaintiff; sworn.

The Clerk: State your name, please.

The Witness: Charles A. Mettalia.

Direct Examination

By Mr. Murman:

Q. What is your business, Mr. Mettalia?

A. I am Casualty Superintendent of the Fidelity Casualty Company.

Q. How long have you been so employed?

A. Twenty years.

Q. Do you know Mr. Cantlen, a person who is named, or whose name comes into this case?

A. Yes, I do.

Q. And who is he connected with, if you know?

A. Bayly, Martin & Fay.

Q. They are third-party defendants in this case, are they not? [6] A. They are.

Q. How long have you been in San Francisco?

A. Since November, 1945.

(Testimony of Charles A. Mettalia.)

Q. Prior to that time you were located where?

A. New York City. Our branch office in New York City.

Q. Now, prior to coming to San Francisco did you have any knowledge of the relationship between the plaintiff in this case and the defendants?

A. No, I didn't.

Q. When you came to San Francisco in November, 1945, did knowledge of the relationship between the plaintiff and the defendants come to your attention? A. Yes.

Q. About when was that?

A. Oh, several months later. I would say about February or March.

Q. Of what year? A. 1946.

Q. What was the occasion of the matter coming to your attention at that time?

A. I was appointed Casualty Superintendent for Fidelity and Casualty Company, and being in charge of that department I would familiarize myself with some of the more important risks we had on our account in this area.

Q. It was in the course of discharging that duty that you [7] became informed of this relationship, is that right? A. Yes.

Q. How long has F. and C., plaintiff in this case, been doing business with the defendants?

A. Oh, I would say since about 1940 or 1941.

Q. And in the successive years that intervened had there been insurance placed annually and repeatedly? A. Yes.

(Testimony of Charles A. Mettalia.)

Q. Each policy had followed the other in order, is that correct? A. That is correct.

Q. In 1946 what sort of policy was in effect as between the plaintiff and the defendants in this case?

Mr. Eisner: What part of 1946 do you refer to?

Mr. Murman: During the year commencing September 1, 1945, and extending to September 1, 1946.

A. Well, it is what we call a broad form liability, our symbol being "SPL," a special public liability contract.

Q. Do you remember whether or not that policy had a number? A. Yes, it did.

Q. Do you recall the number?

A. No, I don't.

Mr. Eisner: It was 1457.

Mr. Murman: Yes, there is no dispute.

Mr. Eisner: No. [8]

Mr. Murman: There is no dispute about the effect of No. 1457?

Mr. Eisner: That is correct.

Q. (By Mr. Murman): That particular policy, SPL-1457, Mr. Mettalia, expired when?

A. September 1, 1946.

Q. Prior to the expiration date did you have any conversation about that insurance on the same risk? A. Yes, I did.

Q. About when did those conversations take place?

A. Are you referring with the broker or—I had a conversation——

(Testimony of Charles A. Mettalia.)

Q. Let's put it this way: When did conversations first take place in connection with any insurance following the expiration of SPL-1457?

A. On or about the beginning of July.

Q. Of what year? A. 1946.

Q. With whom did those conversations take place? A. With our San Francisco office.

Q. There was some discussion within the company itself, in other words, is that right?

A. That is right.

Q. Now, following that discussion did you have, at a later date, any discussion with Mr. Cantlen?

A. Yes, I did.

Q. When did the conversations with Mr. Cantlen take place, the first one you recall?

A. On or about the beginning of August.

Q. 1946? A. Yes.

Q. Where did it take place?

A. In the San Francisco office, No. 60 Sansome Street.

Q. That is your office?

A. That is correct.

Q. And who else was present besides yourself and Mr. Cantlen?

A. I think there was just Mr. Cantlen and I.

Q. Prior to this conversation in August, 1946, with Mr. Cantlen had you had any previous conversations with him? I mean, did you know him before?

A. Yes, I knew him as a representative of

(Testimony of Charles A. Mettalia.)

Bayly, Martin & Fay, and handling the account for the California Motor Transport.

Q. Defendants in this cause? A. Yes.

Q. You understand there are several defendants, but they are all generally referred to as California Motor Transport people?

A. That is correct.

Mr. Eisner: I think we might stipulate that reference [10] to California Motor Transport, referred to in this case, we refer to all defendants jointly.

Mr. Murman: That is correct. All defendants are named in the indictment and also named in the policy.

Mr. Eisner: In the indictment?

Mr. Murman: I am sorry. I meant the complaint.

Q. Now, Mr. Mettalia, what was the conversation in August, 1946?

A. Well, we were reviewing the losses and the premiums. In other words, we were making an evaluation of the risk.

Q. Was that after the 1946 contract, that is, SPL-1457?

A. No; as a matter of fact, it was the 1946, 1945, 1944, 1943, and way back to the original contract that we had for this insured.

Q. You were reviewing the full insurance experience up to that time, is that right?

A. That is correct.

Q. You did that for Mr. Cantlen, the broker for the defendants in this case? A. Yes.

(Testimony of Charles A. Mettalia.)

Q. What did Mr. Cantlen say to you at that time and what did you say to him as broker? You don't have to give the exact words, but the substance of the conversation.

A. Well, we reviewed the losses and it indicated a loss ratio much, very much in excess of what we call a permissible [11] loss ratio. Under the conditions, we needed more money to carry on the following year.

Q. Did you say that to Mr. Cantlen?

A. Yes, I did.

Q. What did he say?

A. He had agreed with me that it was definitely developing such a loss ratio that the premium should be increased at renewal.

Q. What was the premium for the issuing of Policy SPL-1457?

A. We had a rate of 1.23 or something like that.

Q. Per what? The rate was so much per what?

A. Per \$100 of receipts.

Q. Gross receipts? A. Gross receipts.

Q. Of the assured? A. Yes.

Q. The policy on issuing the policy was to be determined by taking the gross receipts of the assured and multiplying those gross receipts by \$1.223, is that correct? A. That is correct.

Q. Did that contract require a final audit following this policy? A. Yes.

Q. I mean Policy No. SPL-1457.

A. Yes. [12]

(Testimony of Charles A. Mettalia.)

Q. Was that true of the preceding contracts?

A. Yes.

Q. So that the final premium was to be determined following the expiration of the contract?

A. That is correct.

Q. By final audit? A. That is correct.

Q. That had always been the situation?

A. Yes.

Q. Following that conversation with Mr. Cantlen in which you stated that an increase in the premium was necessary—I believe that is what you said, isn't that right? A. Yes.

Q. He, as you said, agreed to it?

A. That is correct.

Q. What happened?

A. Then we worked up a rate which would be subject to Bureau approval.

Q. When you say "Bureau approval," what do you mean?

A. Well, during the period prior to 1948 all rates were governed, that is, ratings of bureau companies, were governed by the National Bureau of Casualty and Surety Underwriters, and any rate we might discuss would be subject to their final approval before we could use that rate. We then submitted our rates to the Bureau. [13]

Q. Was that Bureau limited to your company or did it extend over other companies?

A. It extended to, oh, as far as number I don't know, but I would say the majority of the com-

(Testimony of Charles A. Mettalia.)

panies are members of the National Bureau, or they may be advisory members so that they use these statistics of the National Bureau and accept their rating all over the country.

Q. The Bureau, then, is an industry bureau in that sense?

A. That is correct, and they would keep all these statistics so that they could be governed in making up rates.

Q. Mr. Mettalia, I show you—did you see this, Mr. St. Clair. I am sorry. (Handing document to counsel.)

Mr. Mettalia, I show you what purports to be a copy of the notice that you just referred to as having been sent to the Bureau, and ask you if that in fact is such a copy? A. That is correct.

Mr. St. Clair: May I ask the date of that, Mr. Murman?

Mr. Murman: It bears date September 19, 1946.

Q. Mr. Mettalia, I show you down in the lower right-hand corner of the face of this notice some handwriting, and ask you if you are familiar with that handwriting as to the person who wrote it?

A. Yes, I am. I know the person very well.

Q. Whose handwriting is it?

A. Mr. Frank J. Van Horn. He was assistant manager of the [14] National Bureau in charge of the West Coast office.

Mr. Murman: At this time, if the Court please,

(Testimony of Charles A. Mettalia.)

I will offer in evidence as Plaintiff's Exhibit 1 the notice identified by the witness.

Mr. Eisner: We object to this, if the Court please, as incompetent, irrelevant and immaterial, not binding upon the defendant and third-party plaintiff in this case. I mean, it is simply a procedure apparently followed without the knowledge of the insured, and apparently to obtain the approval of some unofficial organization of which the plaintiff was a member and of which the insured had no information, and what communications transpired between the insurance company and any of its organization, or an organization of which it was a member, would be hearsay, incompetent and immaterial so far as the insured was concerned.

Mr. St. Clair: May I inquire, before I join in the objection, if it is being offered against the third-party defendant?

Mr. Murman: Well, the case I am putting in is against the defendant in the case, Mr. St. Clair.

Mr. St. Clair: Insofar as it may be offered against the third-party defendants we join in the objection of Mr. Eisner.

The Court: Overruled, subject to a motion to strike if it isn't connected up. [15]

(The notice was marked Plaintiff's Exhibit 1 in evidence.)

Q. (By Mr. Murman): Mr. Mettalia, prior to compiling this notice which bears date September 19, 1946, what, if anything, had been done concern-

(Testimony of Charles A. Mettalia.)

ing the premium rates as set forth in the notice?

A. Well, we had discussed this rate with our home office. We also discussed this rate with our broker, Mr. Cantlen.

Q. You say "our broker"?

A. I mean the broker for the insurance company.

Q. Was Mr. Cantlen employed by the F. and C.?

A. No, he wasn't.

Q. Did he have any connection with F. and C. from the standpoint of receiving any funds from them, or anything of that character?

A. No.

Q. So you did, prior to sending this notice, discuss the premium rate with Mr. Cantlen?

A. Yes.

Q. Was that discussion before September 1, 1949, the date on which the policy No. SPL-1457 expired?

A. Yes.

The Court: You mean the date it expired?

Mr. Murman: The date before the date it expired, your Honor. It expired, I believe Mr. Mettalia testified, on September 1, 1946. That is SPL-1457. [16]

Q. Isn't that right, Mr. Mettalia?

A. That is correct.

Q. This discussion with Mr. Cantlen concerning the premium was before that date?

A. That is correct.

Q. Do you remember about when it was?

A. Oh, I would say about the latter part of August, 1946.

(Testimony of Charles A. Mettalia.)

Q. Where did it take place, do you recall?

A. 60 Sansome Street, my office.

Q. What did you tell Mr. Cantlen at that time and what did he say to you?

A. We proposed these rates, which were subject to National Bureau approval.

Q. You told him you were proposing the rates subject to the National Bureau approval?

A. Yes.

Q. What rates did you tell him you were proposing?

A. \$2 for the primary coverage and 20 cents for the excess coverage.

Q. Is that \$2 per \$100 for gross receipts?

A. Yes.

Q. And 20 cents per \$100 gross receipts for the excess?

A. That is correct.

Q. A total premium for its policies of \$2.20 for \$100 gross receipts? [17]

A. That is correct.

Q. You stated that to Mr. Cantlen before the expiration date of SPL-1457, correct?

A. That is correct.

Q. You told him those rates were subject to approval by the Bureau?

A. Yes.

Q. Did you tell him you were going to notify the Bureau of those rates if he approved them? Withdraw that question. I am assuming something not yet in evidence.

What did Mr. Cantlen say when you gave him those figures?

A. Oh,—

(Testimony of Charles A. Mettalia.)

Q. Well, I don't mean exactly. What in substance, was his reply?

A. That the rate was reasonable because of the past experience and other conditions that arose in the industry as a whole.

Q. What, if anything, did he say about your statement that they were going to be referred to the Bureau? Did he say anything about that?

A. No, but—I don't recall.

Q. But you do recall you told him the rates were subject to the Bureau approval, is that right?

A. Yes, that is correct.

Q. Following this was there anything else in that conversation that bears on this matter that you can recall? [18]

A. Well, no. We went over these figures extensively. I remember roughly that the percentages of loss ratio certainly were unbalanced.

Q. Did you tell him what they were at that time? A. Yes, I did.

Q. What did you tell him?

A. The premiums were approximately—that is, over the period we were on the risk—\$66,000 with about \$77,000 or \$78,000 in losses.

Q. You told Mr. Cantlen that? A. Yes.

Q. That was in the same conversation where you told him about the insurance premium rates being subject to the Bureau approval, is that right?

A. That is correct.

Q. Following that conversation, what, if anything, was done about the new policies?

(Testimony of Charles A. Mettalia.)

A. We finally agreed on the rates. I submitted my formula to the National Bureau. The policies could not be issued until that approval was forthcoming, so that we had to issue a binder pending the approval of the Bureau, so we proceeded with the binder and then when the National Bureau approved the rates, why, we went ahead and issued the policy.

Q. Now, at the time you issued the binder were there any numbers assigned to the prospective new policies? [19]

A. Yes, we had to assign a number to the policy because—to the insured, because of certain Federal and State filings we had to make.

Q. What were those filings to be?

A. We had to make a Railroad Commission filing, which is now known as the Public Utilities Commission, and also had to make a filing for the ICC, otherwise they would immediately stop the operations of the California Motors.

Q. So at the time the binder was issued, following this conversation with Mr. Cantlen and prior to the approval by the Bureau, you did assign policy numbers to these prospective contracts and make the filings with the Railroad Commission and the ICC?

A. Yes; otherwise——

Q. And about—pardon me.

A. Otherwise the binder wouldn't be very much value to an insured without these filings.

Q. By the way, Mr. Mettalia, the filings with the Railroad Commission and the ICC were only

(Testimony of Charles A. Mettalia.)

as to the primary insurance, isn't that correct?

A. Yes, because that is all they require.

Q. That is the minimum?

A. That is the limit that the ICC and the Railroad Commission require.

Q. That satisfied the minimum limit? [20]

A. That is correct.

Q. At this time I show you what purports to be a copy of the filing with the Railroad Commission of the State of California and ask you if it is—if you identify it as such.

A. That is correct.

Q. I notice it carries the stamp of the "Railroad Commission, State of California, August 28, 1946, Transportation Department." Does that recall to you on or about the date it was filed?

A. Yes, this was filed with the Railroad Commission on August 27, which is the date there, and it was accepted by the Railroad Commission on August 28.

Q. 1946? A. 1946.

Q. That was before the expiration date?

A. That is correct.

Q. On the then existing policy SPL-1457?

A. That is correct.

Q. On this filing I note you have stated the policy number SPL-20968.

A. That is correct.

Q. Is that the number assigned to the primary policy of the new policies? A. Yes.

Mr. Murman: At this time I offer in evidence as [21] plaintiff's exhibit next in order the copy identified by the witness.

(Testimony of Charles A. Mettalia.)

The Court: It may be admitted.

(The document was marked Plaintiff's Exhibit 2 in evidence.)

Q. (By Mr. Murman): You said there was a filing made with the ICC. Was that made by the San Francisco office?

A. No. All ICC filings are controlled by our New York office, at our direction, of course.

Q. What is the procedure as to the ICC filing, for the information of the Court, in connection with this particular filing, do you recall?

A. Well, we usually send a wire or memorandum to our home office to instruct them to file the ICC. They will file it and then they will confirm that filing to us. They will send us a form letter that the filing has been made.

Q. That is all you receive back which you would have in your file here, that such a filing was made?

A. That is correct.

Q. And again, the filing is limited to the primary policy, is that correct? A. Yes.

Q. I think I asked that before. I am sorry.

A. Yes.

Q. At this time, Mr. Mettalia, I show you what purports to be a telegram from you to the New York office of your company, [22] together with a reply from that office to your office, to your attention, a telegram——

I believe, your Honor, I have anticipated a matter here. I think I have the wrong telegram, and the

(Testimony of Charles A. Mettalia.)

wrong answer. I will have to withdraw the offer at this time.

Mr. Eisner: May I have that, counsel, please? I want to use it.

Mr. Murman: I am going to offer it later on. I am not going to withhold it, but it is in the wrong chronology.

Mr. Eisner: I want to make a note of it.

Mr. Murman: All right.

Q. I don't seem to have such a wire and letter here in my file, Mr. Mettalia. Do you recall one having been sent and received back in this case?

A. Oh, yes.

Q. Now, was that wire sent about the time that the filing was made with the Railroad Commission of California? A. Yes.

Q. Do you know whether or not that filing was made before the expiration date of SPL-1457?

A. Yes.

Q. That is, the filing with the ICC?

A. I am sure of it.

Q. Did that filing refer to SPL-20968, the primary, new policy? [23] A. Yes, sir.

Q. Referring to Plaintiff's Exhibit 1 in evidence, the identified signature of Mr. Van Horn, I see under that signature "9/25/46." Did you receive the notice back with that signature and date endorsed on it as "9/25/46"? A. Yes.

Q. What if anything did you do after you received the Bureau approval?

(Testimony of Charles A. Mettalia.)

A. We proceeded with the issuance of the policies.

Q. To whom were the policies given?

A. Bayly, Martin & Fay.

Q. Any one individual in that organization?

A. Oh, I don't know. I suppose——

Q. Not what you suppose. Do you recall whether they were sent by a letter of transmittal, or was it a manual delivery?

A. It was a manual delivery.

Q. It was a manual delivery? A. Yes.

Q. To Bayly, Martin & Fay?

A. That is correct.

Q. But you don't know at this time to whom that delivery was actually made? A. No, I don't.

Q. At this time, Mr. Mettalia, I show you policy No. SPL-20968, which purports to be the original policy, and ask you [24] whether or not you can identify it as such and as one of those two policies delivered to Bayly, Martin & Fay.

A. That is correct. This is the original policy.

Mr. Murman: At this time, if the Court please, I ask that the policy identified by the witness be marked Plaintiff's exhibit next in order in evidence.

The Court: Admitted.

(The policy was marked Plaintiff's Exhibit 3 in evidence.)

Q. (By Mr. Murman): I also show you, Mr. Mettalia, policy No. SPL-20950, which purports to be the original policy, and ask you whether or not

(Testimony of Charles A. Mettalia.)

that is one of those two policies delivered to Bayly, Martin & Fay at the time you stated.

A. That is correct.

Mr. Murman: I make a similar offer as to this policy, your Honor.

The Court: What is that? No. 20950?

Mr. Murman: Yes, your Honor, 20950.

(The policy was marked Plaintiff's Exhibit 4 in evidence.)

Mr. Murman: At this time, if the Court please, I would like to call to your Honor's attention the fact that on the face and in the endorsements of this policy it is provided that the rate is subject to final audit.

Q. Attached to the policy as an endorsement is a printing entitled "Premium periodically adjusted for casualty payroll policies only." This reads, "It is hereby agreed that each [25] months the premium for the preceding period of the policy shall be determined upon the actual basis for such period, and the insured shall immediately pay the additional premium due. In accordance with the provisions of the policy the insured shall file with the company promptly upon the completion of each of such periods, a written statement of the actual basis of the premium for the said period. It is further understood and agreed that the advance payment made by the insured on account of the premium for this policy shall not be credited until the last payment under the foregoing endorsement is due. This

(Testimony of Charles A. Mettalia.)

endorsement shall not be binding upon the company unless countersigned by a duly authorized representative of the company."

Then it bears the proper dates and countersignature.

Mr. Eisner: What is the number of that rider, please?

Mr. Murman: It doesn't bear a number, Mr. Eisner, but does have a form number. It is the first endorsement under the face of the policy and it is Form No. L-1403D.

Special endorsement No. 7 attached to the policy reads as follows: "In consideration of the premium at which this policy is issued it is hereby understood and agreed that the policy does not apply under coverage 'A' except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining." Under that appears [26] "Premium determination. Estimated annual gross earnings."

Q. Mr. Mettalia, do you recall where that estimated annual gross earnings came from that appears there in the policy, \$1,500,000?

A. Well, it would be one of two ways we got that, either from the broker or our previous annual overall audit that we made.

Mr. Murman: Then it is provided, your Honor: "Rate per \$100 of gross earnings, \$2. Estimated annual premium, \$30,000." Under that in regular

(Testimony of Charles A. Mettalia.)

typewritten language is this: "Final premium to be determined by audit." That bears the dates, as do the other endorsements, and countersigned signatures.

There is also attached hereto as an endorsement the endorsement showing the filing with the ICC. That is as to the primary insurance. It, by the way, your Honor, referred on the face of the policy to "Excess" by "Number of preceding policy, SPL-1457. See also SPL-20950." The excess policy, which bears the lower number, SPL-20950, has a similar endorsement exactly the same as the endorsement I read to you first on the other policy, your Honor. That again bears the same form number, Mr. Eisner. No endorsement number.

Now, the endorsement that is similar to the one I read in the preceding policy, your Honor, that was numbered 7, is in this policy numbered No. 10, and it provides: "Premium determination, estimated annual gross earnings, \$1,500,000." [27] The same figure. "Rate per \$100 of gross earnings, \$.20. Estimated annual premium, \$3,000. Final premium to be determined by audit."

This, of course, is the excess policy, but it has the same endorsements in it in connection with the determination of the premium.

Q. Now, Mr. Mettalia, as to Plaintiff's Exhibits 3 and 4, the policies in question, there appears on the face of each that the policy period is from September 1, 1946, to September 1, 1947. Can you state whether or not there was any different policy

(Testimony of Charles A. Mettalia.)

period than that appearing on the face of these contracts? A. No, there wasn't.

Q. Are you referring to the beginning of the period or the end of the period?

A. Both. I mean, the policy was effective September 1, 1946, and expired September 1, 1947.

Q. Would there be any way that that policy, that policy period would be shortened?

A. Only by a cancellation notice or by endorsement, which must be acknowledged by the insured. That is the only two ways I know of, or if the policy is returned for cancellation.

Q. Were either of those two ways followed in this particular case? A. Yes. [28]

Q. Which of the two?

A. We sent out cancellation notices.

Mr. Murman: Do you have those original notices, Mr. Eisner?

Mr. Eisner: Yes.

Mr. Murman: I think they were included in my demand.

Mr. Eisner: Yes, I have them.

Q. (By Mr. Murman): Mr. Mettalia, I show you what purports to be a cancellation notice dated December 19, 1946, addressed to California Motor Transport people, bearing all of the names on the reverse side, and referring to policy No. SPL-20968, and stating the cancellation takes effect on the 21st day of January, 1947, at 12:01 a.m. standard time. I ask you if that can be identified by you as the

(Testimony of Charles A. Mettalia.)

notice sent to the defendants in this case in connection with that particular policy.

A. That is correct. This is the notice.

Mr. Murman: I offer this in evidence as plaintiff's exhibit next in order.

The Court: No. 5.

(The cancellation notice was marked Plaintiff's Exhibit 5 in evidence.)

Q. (By Mr. Murman): I also show you, Mr. Mettalia, a similar notice, similarly dated, in all respects the same except for the policy number, SPL-20950, and ask you if you identify that as such a notice. [29]

A. That is correct.

Mr. Murman: I offer this in evidence as plaintiff's exhibit next in order, your Honor.

The Court: No. 6.

(The notice of cancellation was marked Plaintiff's Exhibit No. 6 in evidence.)

Q. (By Mr. Murman): Mr. Mettalia, in connection with the notices of cancellation you have just identified, was there a notice of cancellation filed with the Railroad Commission as to primary policy SPL-20968?

A. Yes, there was.

Q. I show you at this time what purports to be a copy of such a notice, referring to policy No. SPL-20968, and referring to the defendants in this case, and ask you if you can identify that as a copy of the notice which was filed?

A. That is correct.

Q. When you filed the original, it did not bear

(Testimony of Charles A. Mettalia.)

the stamp up there, up in the left-hand corner, did it? A. No, it didn't.

Q. That was stamped on the copy at the time the filing was made? A. That is correct.

Mr. Murman: Your Honor, it is stamped there, "Railroad Commission, State of California, December 20, 1946, Transportation Department, Truck and Stage Division." And the [30] notice on its face shows the cancellation to be effective as of the same date the notice is given, January 21, 1947. I offer this in evidence as plaintiff's exhibit next in order.

(The document was marked Plaintiff's Exhibit 7 in evidence.)

Q. (By Mr. Murman): Now, Mr. Mettalia, was there a cancellation given to the ICC?

A. Yes, there was.

Q. In what manner was that notice given?

A. We notified the home office to send out the insurance notice to the ICC.

Q. How was that notification given to the home office, do you remember?

A. I believe by wire.

Q. By wire? Did you receive back word that that cancellation had occurred? A. Yes.

Mr. Murman: Do you have those?

Mr. Eisner: Yes, I have.

Q. (By Mr. Murman): At this time I show you, Mr. Mettalia, what purports to be copy of such wire and the original of such reply, referring to the

(Testimony of Charles A. Mettalia.)

cancellation of the filing with the ICC, and ask you if you identify those documents as purporting to be what I just referred to.

A. That is correct. [31]

Mr. Murman: At this time, if the Court please, I offer these two documents collectively as plaintiff's exhibit next in order, since they both apply to this same action.

(The documents were marked Plaintiff's Exhibit 8 in evidence.)

Q. (By Mr. Murman): Now, Mr. Mettalia, your particular duties have to do with the knowledge of claims filed, do they? A. Yes, they do.

Q. Can you state whether or not any claims were filed by the defendants in this case under the policies or either of them which are now Plaintiff's Exhibits 3 and 4 in evidence, namely, SPL-20968 and SPL-20950, during the time elapsing between September 1, 1946, and January 21, 1947?

Mr. Eisner: Just a moment. We object to that as calling for a conclusion of the witness. The witness can testify as to whether or not claims were filed, and the claims will speak for themselves, but the statement as to whether or not the claim was filed under these policies or whether they were filed under a binder would call for a conclusion of the witness.

The Court: I think that objection is good.

Mr. Murman: I think that is correct, your Honor.

(Testimony of Charles A. Mettalia.)

The Court: Reform your question.

Mr. Murman: Yes, your Honor. [32]

Q. Mr. Mettalia, can you state whether or not any claims were filed with the plaintiff in this case during the time elapsing between September 1, 1946, and any date thereafter?

A. Yes, there have been.

Q. In this area, Mr. Mettalia, you have one office or more than one office with whom the defendants in this case would do business under these policies?

A. We have one office.

Q. One office? A. Yes.

Q. Where is that office?

A. 60 Sansome Street.

Q. Is there another office in the State of California?

A. Yes, we have several offices other than the one in this area.

Q. Where is that office?

A. We have one in Los Angeles, one in Fresno, one in Oakland, and one in Bakersfield.

Q. Do you know whether or not claims were received by those other offices? A. Yes. Yes.

Q. Claims that are received in the Los Angeles office, are they sent to San Francisco? A. No.

Q. Claims that are received in the Fresno office, are they [33] sent to San Francisco? A. No.

Q. Claims that are received in the Oakland office, are they sent—where are they sent?

A. The Oakland office.

(Testimony of Charles A. Mettalia.)

Q. Does San Francisco have any knowledge of those claims in Oakland? A. Yes.

Q. Does San Francisco have any knowledge of the claims filed in the other offices you mentioned?

A. Yes.

Q. Do you know, Mr. Mettalia, from your records as to how many claims were received by the company from the defendants in this case after September 1, 1946? A. Yes.

Q. How many? A. 98.

Q. 98. And do you know from the files of your office as to how much money was paid out on those claims? A. About \$7800, I believe.

Q. That is in round numbers? A. Yes.

Q. And those claims were all claims that arose after September 1, 1946, and were paid after that date, is that true? A. That is correct. [34]

Q. So far as you know, there are no further claims outstanding, is that correct.

A. That is correct.

The Court: We will take a five-minute recess.

(Recess.)

Q. (By Mr. Murman): Mr. Mettalia, I show you what purports to be claims filed with the plaintiff by the defendants in this case, and ask you whether or not you identify the documents which I have handed to you as such. A. That is correct.

Q. Are they all of the claims?

A. No, they are not. These are the claims that were submitted to our San Francisco office. Don't

(Testimony of Charles A. Mettalia.)

include the other claims offices that we have in this territory.

Q. Do you know what if anything happened to those other claims?

A. Yes, all other claims offices, they submit their reports to our home office. See, they are more or less field claims offices.

Q. But these were written in San Francisco and are being produced as a portion of the claims that were filed? A. That is correct.

Q. Over what period do those you have in your hand extend? When is the date of the first claim?

A. September 1, 1946. [35]

Q. What is the date of the last claim?

A. January 20, 1947. Do you want the last date of accident?

Q. Yes.

A. January 20, 1947. Then we have a report of claim——

Q. Is that an additional claim you are referring to now?

A. Yes. Then we have another date of accident, November, 1946, and that was reported December 4, 1947.

Q. Did you receive the report of that claim of accident which happened in November, 1946, in December, 1947? Is that correct?

A. That is correct.

Q. What happened to that claim?

A. This was a suit for \$15,000 and we defended

(Testimony of Charles A. Mettalia.)

it, and successfully, for the California Motor Transport.

Q. That was reported to you in December, 1947, is that correct? A. Yes, sir.

Q. You then took the defense of it and successfully defended it, is that correct?

A. That is correct.

Q. You expended money in the defense, did you?

A. Yes, we did.

Q. There are vouchers attached there to that.

Do you have the total of those vouchers?

A. Yes. [36]

Q. What is the total amount expended?

A. \$1,671.77.

Q. That was paid by the plaintiff in the defense of the defendants' lawsuit as shown by that claim, is that correct? A. That is correct.

Q. So that you got what we call a defendants' result there? A. Yes, sir.

Mr. Murman: At this time, if the Court please, I offer in evidence collectively as plaintiff's exhibit next in order the claims filed, identified by the witness, and ask that they be so marked.

The Court: Very well.

(The claims were marked Plaintiff's Exhibit 9 in evidence.)

Mr. Murman: You may cross-examine.

(Testimony of Charles A. Mettalia.)

Cross-Examination

By Mr. Eisner:

Q. Mr. Mettalia, your company had been doing business with Bayly, Martin & Fay for a great many years, isn't that true—Fidelity and Casualty Company? A. I believe so; I am not sure.

Q. There was a policy that the California Motor Transport Company had from September 1, 1945, to September 1, 1946? A. That is correct.

Q. I am going to show you this policy No. 1457, and ask if you can identify it as the policy of the California Motor [37] Transport Company that was in existence from September 1, 1945, to September 1, 1946? A. That is correct.

Mr. Eisner: You are familiar with that, counsel?

Mr. Murman: Yes.

Mr. Eisner: We offer this policy in evidence as Defendants' exhibit.

Mr. Murman: To which we object as incompetent, irrelevant and immaterial, not binding upon the plaintiff, not within the issues of this case.

The Court: Overrule the objection. That is Exhibit A. How are you going to mark them?

The Clerk: I didn't think I would distinguish. I thought I would mark it just Defendants' Exhibit. You think it should be distinguished?

The Court: I think so.

The Clerk: This will be Defendants' Exhibit A.

(Testimony of Charles A. Mettalia.)

I will mark the third party defendant's exhibits with double letters.

(Policy No. SPL-1457 was marked Defendant's Exhibit A.)

Q. (By Mr. Eisner): It is the practice of the insurance company, prior to the time that a policy of an insured expires, to issue or get out a renewal policy so that it can be effective as of the date of expiration of the original policy, isn't that true?

A. Yes, that is correct? [38]

Q. Now, then, in this instance you began talking with Mr. Cantlen and Bayly, Martin & Fay sometime prior to September 1, 1946, that is to say, sometime in August? A. That is correct.

Q. Early in August, was it? A. Yes.

Q. You discussed with Mr. Cantlen the rate that should be applicable to the policy if renewed for another year; that is true? A. That is correct.

Q. And do I understand from you that prior to September 1, 1946, you came to an agreement with Mr. Cantlen that the rate for the renewal policy during the succeeding year would be \$2.20?

A. That is about right, yes.

Mr. St. Clair: What was that answer?

A. Yes.

Q. (By Mr. Eisner): In other words, prior to September 1, 1946, you had then—and I mean the Fidelity and Casualty Company—come to a definite agreement with Mr. Cantlen as to what the rate of

(Testimony of Charles A. Mettalia.)

premium would be for the policy during the succeeding year?

A. Subject to home office approval—subject to the approval of the National Bureau of Casualty and Surety Underwriters and submitting the return to the home office for [39] our formula.

Q. So far as Mr. Cantlen was concerned, he was satisfied that the rate during the succeeding year would be \$2.20, is that correct?

A. If it were approved by the National Bureau. In other words, we couldn't agree on any rate at all unless the Bureau so advised us to use that rate. We had assumed the National Bureau would go along on that rate.

Q. Yes. Well, then, to restate that, you had an agreement with Mr. Cantlen as to what the premium would be, which was \$2.20, subject to the approval of the National Bureau?

A. That is correct.

Q. After September 1, 1946, you had no further negotiations with Mr. Cantlen respecting the rate of premium upon this policy for the renewal during the succeeding year? A. I didn't.

Q. Yes. I am restating your testimony.

A. Periodically Mr. Cantlen came in the office to see us.

Q. I understood you to say that so far as Mr. Cantlen was concerned, you had an agreement with Mr. Cantlen prior to September 1, 1946, that the rate upon this renewal would be \$2.20, subject to ap-

(Testimony of Charles A. Mettalia.)

proval of the National Bureau?

A. That is correct.

Q. I will ask you the question again: After September 1, did you have any further negotiations with Mr. Cantlen as to [40] what the rate would be during that succeeding year, September 1, 1946, to September 1, 1947? A. No.

Q. Very well. Now, then, Mr. Mettalia, in policy No. 20946, which has been introduced in evidence, you called attention, or your attention was called to the fact it provides for an annual audit?

Mr. Murman: May I interrupt? I don't think there is a 20946. I think you have the wrong number.

Mr. Eisner: Very well, that may be No. 20968.

A. Yes.

Q. I wish to make clear what those annual audits are. That annual audit was an audit that was made by the insurance company of the books of the insured as of the expiration of the insurance period in order that the insurance company could be sure that the insured had properly reported its gross earnings for the insured period, is that correct?

A. No, you are wrong.

Mr. Murman: I object to this on the ground that this witness would be giving his conclusion, as he is not in the auditing department, your Honor. He is in the underwriting department. I may say, we have a man from the auditing department and he will be produced as a witness and can testify from his own personal knowledge. Furthermore, the

(Testimony of Charles A. Mettalia.)

question is complex and compound and I don't understand it myself. But [41] this witness isn't capable of answering it.

The Court: I don't think the question is complex. It may be calling for his conclusion, but the man said "No," so I will allow it. He said "No."

Mr. Murman: I didn't hear the answer.

Q. (By Mr. Eisner): Do you know?

A. No.

Q. Do you know, Mr. Mettalia, the meaning of the provision of the policy that there shall be an audit by the company at the expiration of the insurance period in order to determine what the gross premium is?

A. It isn't—the audit isn't made for gross premiums alone. I think I know what you are trying to get me to explain.

Q. What is it made for?

A. A contract of this type, as we had it before, is a broad form liability policy, and it is based on certain exposures that are developed at the time we issue the contract. When an auditor goes to make an audit, the meaning of that audit is to pick up the payrolls, receipts, and any other exposures that the insured may have entertained during that period. If I may explain further, your Honor, by this I mean if he decides to buy a hotel, we pick up that exposure because he is automatically covered under the original contract. That is part of what the auditor does when he goes out to make that [42] audit, and that is in the provision of the contract.

(Testimony of Charles A. Mettalia.)

Q. Then the purpose is, Mr. Mettalia, to ascertain what are the gross receipts from any source of the insured to which the premium should be applied at the rate specified in the policy, is that correct?

A. That is correct.

Q. Now, then, Mr. Mettalia, this rate of premium, you say, was referred to the National Bureau?

A. That is correct.

Q. On September 19——

A. That is correct.

Q. ——1946? A. Yes.

Q. On August 27, 1946, did the Fidelity and Casualty Company issue a binder to the insured?

A. Yes, sir, we did.

Mr. Eisner: Can you produce a copy of the binder, please?

Mr. Murman: Yes, I can. We don't have the original. I understand the original was delivered to the assured, but we have a copy of it.

Mr. Eisner: Thank you. We can use a copy.

Q. I show you this photographic copy and ask you if you recognize it as the photographic copy of the binder that was issued to the California Motor Transport Company on August 27, 1947? [43]

A. That is correct.

Q. 1946, rather. A. That is correct.

Mr. Eisner: We offer this binder in evidence as defendants' exhibit next in order.

Mr. Murman: No objection.

Mr. St. Clair: No objection.

(Testimony of Charles A. Mettalia.)

(The binder was marked Defendants' Exhibit B in evidence.)

Q. (By Mr. Eisner): As I understand it now, Mr. Mettalia, you received an approval from the National Bureau, to which you referred this premium, about September 27, was it?

A. Approximately, yes, 27th or 28th; September 27 or 28.

Q. Then, Mr. Mettalia, it was after September 28 in 1946, as I understand it, that the policies, Plaintiff's Exhibits 3 and 4, were delivered to Mr. Cantlen? A. Yes.

Q. Approximately when were they delivered to Mr. Cantlen, according to your best recollection?

A. May I see the policies?

Q. Certainly. It is 20950.

A. I would say one of the policies was—let me see; that is about October 1, approximately October 1, maybe October 2. But that needs a little explanation, because I am basing it on the day we prepared these policies and was, in other words, the date the typist types these policies and then submits them [44] to us for review, and we don't have anything here to show the exact date, so I would say on or about the end of September or beginning of October.

Q. Now, then, at the time that you delivered those policies to Mr. Cantlen, did you at the same time deliver to Mr. Cantlen a retrospective agreement? A. Yes, I did.

(Testimony of Charles A. Mettalia.)

Mr. Eisner: I will ask counsel to produce this retrospective agreement.

Q. I show you this document and ask you if it is the retrospective agreement that you at the same time delivered to Mr. Cantlen. A. Yes, I did.

Mr. Eisner: We offer this document in evidence as defendants' exhibit next in order.

Mr. Murman: To which I object on the ground, may it please the Court, it was never executed by the defendants and therefore is not in the issues of this case.

The Court: Well, it may have some bearing on the issue that Mr. Eisner raised. I will admit it.

(The agreement was marked Defendants' Exhibit C in evidence.)

Q. (By Mr. Eisner): Now, Mr. Mettalia, you presented this retrospective agreement and the two policies to Mr. Cantlen at one time, did you not? [45] A. I believe so.

Q. And you requested that the insured sign this retrospective agreement as a condition to the policies becoming effective, did you not?

A. No, absolutely not.

Q. Well, Mr. Mettalia, didn't you request Mr. Cantlen to have the insured sign the retrospective agreement? A. Yes.

Q. By the way, in order to make it clear, this retrospective agreement was an agreement whereby the amount of premium would either be raised to

(Testimony of Charles A. Mettalia.)

150 per cent or lowered to 50 per cent of its—of the agreed amount, dependent on the loss experience of the insured; is that correct?

A. Plus other factors, acquisition cost and production cost, and so on.

Q. Do I understand you to say you didn't ask Mr. Cantlen to have the insured sign this retrospective agreement?

A. No, I didn't say that, Mr. Eisner.

Q. What did you say to Mr. Cantlen when you gave him this retrospective agreement at the same time that you gave him these policies?

A. That we wanted to accept the policy on—we wanted that signed so that that would be part of the renewal policy. A retrospective rate basis is more or less to the advantage of the insured by signing such an agreement. Of course it [46] could be the other way, too.

Q. Could be the other way, too?

A. It is possible, yes.

Q. Isn't it a fact you asked Mr. Cantlen at the same time to have the insured sign this agreement?

A. Yes.

Q. You did? Now, then, Mr. Mettalia, this retrospective agreement was never signed, was it?

A. That is correct.

Q. Did Mr. Cantlen tell you that he submitted the retrospective agreement to the client, the insured? A. Yes.

Q. Did Mr. Cantlen tell you that the insured refused to sign the retrospective agreement?

(Testimony of Charles A. Mettalia.)

A. Yes.

Q. Was it after the insured refused to sign the retrospective agreement that the insurance was cancelled by Fidelity and Casualty Company?

A. Yes.

Q. Was the insurance cancelled at the request of the insured because the insured was not willing to take and sign the retrospective agreement?

A. What was that?

Q. Was the insurance cancelled at the request of the client, California Motor Transport Company? [47]

A. No.

Q. Because it wasn't willing to sign the retrospective agreement?

A. No.

Q. I show you Plaintiff's Exhibit 8, and I call your attention to this language, which is a telegram dated December 19, 1946, from C. A. Mettalia, Superintendent, Casualty Department, Fidelity and Casualty Company of New York, to Mr. Frank G. Haley, Superintendent, Automobile Department, Fidelity and Casualty Company of New York, "California Motor Transport SPL-20950 and 20968. Request home office send cancellation notice to ICC effective January 21 stop Insured refused to sign retrospective agreement."

A. Yes.

Q. Was the reason for the cancellation that the insured refused to sign the retrospective agreement?

A. You didn't finish that wire, did you?

Q. I will read the rest of it: "Fidelity bonds were not renewed with us as originally agreed Stop

(Testimony of Charles A. Mettalia.)

Railroad Commission notice will be sent from this office.” A. Yes.

Q. I will ask you again if the reason for the cancellation was that the insured refused to sign the retrospective agreement. A. Yes. [48]

Q. That was the reason, wasn't it?

A. Partly the reason.

Q. All right. What did you refer to when you said, “Fidelity bonds were not renewed with us as originally agreed?”

A. When this risk, when he was told on what basis we would write the entire account at, we had used a rate we would accept based on all our overall volume of business from the insured. We had hoped that the Bureau would go along with us in using that rate. Normally the Bureau would go along and accept that rate, particularly because of the rate, the tremendous rate increase prior to September 1, 1946. In our negotiations we negotiated that way.

Q. As I understand it, then, the meaning of that language is that the Fidelity and Casualty Company had hoped to receive the bond business from the insured, is that right?

A. In other words, we had hoped to get out of the red. We had lost.

Q. Did the fact that you did not receive the bond business have anything to do with the cancellation?

A. Yes, partly.

Q. Then the joint reasons for the cancellation was the fact that the retroactive agreement was not

(Testimony of Charles A. Mettalia.)

signed by the insured, and that you had not received the Fidelity business from the insured?

A. That is another reason. [49]

Q. Two reasons. Now, then, Mr. Mettalia, your answer—excuse me. The complaint in this case states that the policies were issued, made, executed and issued on or about September 1, 1946, is that correct?

A. The policies were?

Q. Yes.

A. Binders were issued, which is the same as a policy.

Q. Just a moment. A binder was issued on August 27, 1946?

A. That is correct.

Q. Then on about October 1, 1946, you say you delivered these policies to Mr. Cantlen?

A. Yes, that is correct.

Q. I am asking you if it is a fact that these policies were issued on or about September 1, 1946.

Mr. Murman: To which I object on the ground that the policies are the best evidence of what dates they cover and the period of time in which the insurance was in force and when they were issued.

The Court: What is the date of the policy?

The Witness: September 1, your Honor.

Mr. Murman: Would your Honor wish to see them?

The Court: No.

Mr. Murman: The dates are September 1 in each case, your Honor. The policy period of September 1, 1946, at 12:01 o'clock is stated on the policy. [50]

The Court: Well, I feel that they are quite

(Testimony of Charles A. Mettalia.)

clear, that they may not have been actually signed on that date, but they were intended to relate back to September 1, 1946.

Q. (By Mr. Eisner): Well, one thing I want to make clear, Mr. Mettalia, by whom was this binder signed?

A. One of our employees. This is a copy of the original binder.

Q. This does not bear the signature?

A. No.

Q. Was that binder delivered to Bayly, Martin & Fay? A. Yes.

Q. The original of it?

A. I assume that it was.

Mr. Eisner: I just want to call the Court's attention to the fact that this binder—I think we should do that at this time—that it says, the binder, "Pending renewal of Policy No. SPL-1457."

A. That is correct.

Q. And it is dated August 27, 1946?

A. Yes.

Mr. Murman: I think you should read the language in the latter part there, Mr. Eisner.

Mr. Eisner: You can, if you wish.

Mr. Murman: I mean, that is, I think, in connection with the point you are making and should be before the Court [51] if there is going to be any point made.

Mr. Eisner: I won't read the entire binder at this time.

(Testimony of Charles A. Mettalia.)

Mr. Murman: May I at this time read that last paragraph, then? Do you mind?

Mr. Eisner: I will read it, if you want it.

“If the company accepts the risk, the policy issued shall supersede this binder, and the policy term shall begin on the binder date. If the risk is not accepted, this binder may run to expiration, or the company may cancel by mailing notice to the insured and to the broker (or agent) upon whose application it was issued. A premium charge at the rates and in compliance with the Rules of the Manual of Rates in use by the company when this binder becomes effective will be made for the time this binder is in effect if no policy of insurance in place hereof is issued and accepted by the insured. Not valid unless duly signed.”

Mr. Murman: Thank you.

Q. (By Mr. Eisner): This is a bona fide printed form of binder used by the insurance company?

A. It was a common binder and just like the policy.

Q. It is a printed form of binder that is filled in? A. Yes.

Mr. Murman: The binder speaks for itself, your Honor. [52]

Mr. Eisner: It does speak for itself.

Q. Now, Mr. Mettalia, was there any notice ever given of the cancellation of that binder?

A. Was there any notice?

(Testimony of Charles A. Mettalia.)

Q. Yes, any notice ever given to the insured of the cancellation of that binder.

Mr. Murman: That is incompetent, irrelevant and immaterial, since the binder provides on its face it will be superseded by the policy issued, and that binder is not issued if the policy is issued.

Mr. Eisner: Just a moment. Our thought is that the binder was never superseded by a policy and the policy never became effective.

The Court: I understand the point. I will let him answer the question.

A. Was notice sent to the insured, is that what you asked?

Q. (By Mr. Eisner): Yes, cancelling the binder.

A. No.

Q. Mr. Mettalia, policies 20968 and 20950 provide for a deposit premium to be paid, do they not?

A. Yes.

Q. And the deposit premium was to be paid at the time the policies became effective?

A. Not necessarily, no.

Q. Well, all of your policies that the insured had provided [53] for deposit premiums, did they not? A. I don't know.

Q. Well,—

A. Policies of our company had deposit premiums, yes.

Q. And the Fidelity and Deposit Company has requested payment by the California Motor Transport Company of a deposit premium?

(Testimony of Charles A. Mettalia.)

A. You mean the Fidelity and Casualty Company?

Q. Yes. A. I don't know.

Q. Did you ever request payment from Mr. Cantlen or Bayly, Martin & Fay?

A. That isn't in my department.

Q. Well, do you know whether or not any payment of deposit premium was ever made?

A. I imagine so. I don't know.

Q. Well, will you look to see whether or not any deposit premium was ever paid under that policy?

A. That would be up to another man in our department. I am not the cashier.

Q. Now, then, did Bayly, Martin & Fay collect the premium for Fidelity and Casualty Company?

A. I don't know.

Mr. St. Clair: Just a minute. I object to that on the ground that it calls for a conclusion of the witness, the way [54] the question is framed. It is a conclusion as to whether they collected it "for." That implies a relationship that has not been shown in the evidence, or, in fact, expressly denied that there was any relationship.

The Court: You can reframe it.

Q. (By Mr. Eisner): Who collected the premiums from the insured under the policy?

Mr. St. Clair: If he knows.

A. Who collected the premiums?

Q. (By Mr. Eisner): Yes.

A. I don't know who collected the premiums.

(Testimony of Charles A. Mettalia.)

Q. From whom did the insurance company, Fidelity and Casualty, receive the premiums under the policy?

Mr. Murman: Now, if the Court please, this is calling for a conclusion of the witness. He is not in the cashier's department, he is in the automobile department. We have persons here from the company who will testify to those activities. He is not competent to answer the questions.

The Court: If he isn't competent he can say he doesn't know. After all, if he knows who received the premiums and from whom they received them, he can say so, and if he doesn't know he can state that.

Mr. Murman: Yes, your Honor.

Q. (By Mr. Eisner): Can you answer, Mr. Mettalia? A. Bayly, Martin & Fay. [55]

Q. And Bayly, Martin & Fay then collected the premiums from the insured and remitted them to the Fidelity and Casualty Company?

A. I believe so.

Q. Now, Mr. Mettalia, it is stated in the answer that the insured remitted monthly premiums payments to the plaintiff—in the complaint, I should say. A. Yes.

Mr. Eisner: I will ask counsel to produce, if he will, please, Mr. St. Clair, the remittances and reports.

Mr. Murman: I think you demanded I produce them. I have copies of them which I am quite willing you should have.

(Testimony of Charles A. Mettalia.)

Mr. Eisner: Very well.

Mr. Murman: I don't have the covering memos on them, just have the copies.

Q. (By Mr. Eisner): Mr. Mettalia, did you receive monthly from the insured, as alleged in this complaint, the reports of monthly receipts and remittance of premium as stated in the complaint?

A. Yes.

Q. Do you have the reports that were received from the insured and the remittances, or were they sent to Bayly, Martin & Fay?

A. I don't know.

Q. Now, Mr. Mettalia, are you personally familiar with the [56] reports that were made by the California Motor Transport Company——

A. No, I am not.

Q. ——to Bayly, Martin & Fay?

A. No, I am not.

Q. Are you personally familiar with the reports that were made and remittances made by Bayly, Martin & Fay to Fidelity and Casualty Company?

A. No, I am not.

Q. In other words, after this insurance—after these policies were delivered did you have anything to do——

A. Yes.

Q. ——with these policies?

A. Yes, definitely.

Q. Did you receive or examine any of the reports that were made or premium from Bayly, Martin & Fay?

A. No, I didn't.

Q. Who in your department did receive these?

A. Our audit department.

(Testimony of Charles A. Mettalia.)

Q. Did you make any inquiry to find out whether or not, after September 1, 1946, premiums were being reported and paid by the California Motor Transport Company?

A. Our company is such that we don't need that through that particular channel. In other words, I get a periodic review, usually semi-annually, to value a risk of this size, both for [57] premium, income, resources, and anything that may be outstanding with our engineering staff, and so on.

Q. Then you are not familiar with the reports that were made by Bayly, Martin & Fay?

A. No.

Q. Did you make any inquiry to find out whether or not the deposit premium was paid that the policies called for? A. No.

Q. Do I understand you to say that Mr. Cantlen accepted these policies, 20950 and 20968, on or about October 1, 1946? A. Approximately that date.

Q. Did you ask Mr. Cantlen thereafter for this retrospective agreement? A. Yes.

Q. Why did you ask him for the retrospective agreement? A. Why did I ask him?

Q. Yes.

A. So that we could get it executed and give the insured his copies, and so on.

Q. Now, in this telegram, Mr. Mettalia, and your testimony, you say you cancelled the insurance because the insured did not sign the retrospective agreement?

A. That is part of the telegram, sir.

Q. Now, do you mean to say, then, that these

(Testimony of Charles A. Mettalia.)

policies were in effect without the signing of this retrospective agreement? [58]

A. Absolutely, yes, sir.

Q. Did you so tell Mr. Cantlen? A. Yes.

Q. Did Mr. Cantlen accept these policies without the signing or execution of the retrospective agreement?

A. Not only did Mr. Cantlen accept them, but the insured accepted them.

Q. Why do you say the insured accepted them?

A. Because there is an ICC and Railroad Commission filing. If he didn't accept them, he couldn't operate and the ICC and Railroad Commission file would have immediately pulled him off the road.

Q. Regarding these filings, these filings were filed about August 27, 1946, were they not?

A. That is correct, they were.

Q. And they were filed before you had an agreement with Mr. Cantlen upon the rate that would prevail during the succeeding year, is that it?

A. I don't know if that is correct. I am not sure.

Q. They were filed prior to the time that you say you had the approval from the National Bureau? A. That is correct, yes, sir.

Q. They were filed at a time when the binder had been issued to the insured extending 1457, is that correct?

A. Yes. Can I add a little to that? [59]

Q. Yes.

A. When binders are issued we automatically add those assigned policy numbers to satisfy the

(Testimony of Charles A. Mettalia.)

ICC and the Railroad Commission. They do not accept them otherwise. If it isn't satisfactory to the ICC file, they are fined \$30 gross on that particular file.

Q. In other words, in order to satisfy the ICC and Railroad Commission there had to be a certificate upon the file that the insured was covered by the insurance company that was an approved company, is that correct?

A. That is correct, yes, sir.

Q. And in order to satisfy that requirement, on or about August 27, 1946, you made this filing with the Railroad Commission and the ICC and gave the filing that would refer to the number on the policy, is that it?

A. That is correct, yes.

Q. Thereafter you referred the rate to the National Bureau, is that correct?

A. That is correct.

Q. And agreed with the rate with Mr. Cantlen?

A. That is correct.

Q. Now, you stated claims were filed by the insured after September 1, 1946?

A. Yes, sir. As a matter of fact, on September 1, 1946.

Q. These claims were filed on certain forms, were they not? [60]

A. Yes, sir.

Q. In other words, the insured had a form of report blank, is that correct, upon which he would make these returns?

A. Yes.

Q. I show you one of these forms from Exhibit

(Testimony of Charles A. Mettalia.)

No. 9 and ask you if that is typical of all of the reports of claims that were made by the insured following September 1, 1946. A. Yes.

Q. I call your attention to the fact that upon this return of notice of claim there is no reference to any policy number or any policy whatsoever.

A. That is typical of any claims report.

Q. In other words, upon these reports that were made by the insured, and upon all of them, there was no policy number designated by the insured in the space that was left for policy number in this form of claim? A. No.

Mr. Murman: That is objected to as assuming something not in evidence. You asked if that was typical. Now you said it is on all of them.

Mr. Eisner: I will ask this question:

Q. So far as you know—— A. Yes.

Q. ——upon all of the claims forms that were reported by the insured after September 1, 1946, were those claims in the form [61] that I am showing you at this time from this exhibit?

A. No.

Q. In what way did they differ?

A. Some may have policy numbers.

Q. So far as you know do any of them have the policy number? A. Yes.

Mr. Murman: The claim is the best evidence.

Q. (By Mr. Eisner): Can you see on any of these policies where the policy number is upon the form of claim that is presented by the insured?

A. (Examining documents): Well, there are a

(Testimony of Charles A. Mettalia.)

few with the policy number written in pencil. However, I assume from that, if I may, that that would be from our index file. When they get a claim they would have to allocate that claim to a particular policy. My answer is that most all accident reports come in that way.

Q. I am not asking you about all of them, I am asking about reports made——

A. There are pencil notations put in there, and I don't know whether that was put in by the insured or by the broker or our own cashier. You will notice there are some with the SPL-29058, or whatever it is.

Q. Now, Mr. Mettalia, these claims are type-written, are they not, that are presented by the insured? A. Yes. [62]

Q. And on a number of the claims that were presented, then, as I understand your first testimony, there was no policy number at all?

A. That is correct.

Q. And on some others you find the policy number filled in in pencil? A. That is correct.

Q. As I understand you, you don't know who filled in that in pencil? A. No, I wouldn't.

Q. You don't recognize the writing?

A. No.

Q. Or the figures. During this period there were 98 claims presented, as I understand?

A. That is correct.

The Court: It is twelve o'clock. We will adjourn until two o'clock.

(Testimony of Charles A. Mettalia.)

(Thereupon a recess was taken until 2:00 p.m. this date.) [63]

Friday, September 30, 1949

CHARLES A. METTALIA

resumed.

Cross-Examination
(Continued)

By Mr. Eisner:

Q. Mr. Mettalia, I call your attention to special endorsement No. 8 on Plaintiff's Exhibit 4, which is one of the policies, and call your attention to this language: "Premium determination, owned and non-owned automobiles. Division No. 1—Retrospective rating plan—Limits \$10/20,000." I will ask you if the words "retrospective rating plan" upon that endorsement refer to the retrospective agreement which was delivered by you to Mr. Cantlen simultaneously with that policy.

The Court: Which exhibit number is that?

The Witness: Exhibit 4. This is the primary policy?

The Court: No, it isn't.

The Witness: This is the accident policy. Possibly so, yes.

Q. (By Mr. Eisner): Well, does it or doesn't it, Mr. Mettalia? A. Sure.

Q. The words "retrospective rating plan" on endorsement 8 to this policy, which refers to the pri-

(Testimony of Charles A. Mettalia.)

mary rating, states that a retrospective rating plan is applicable, doesn't it?

A. No, it does not. It just says, "Premium determination, [64] owned and non-owned automobiles, Division No. 1—Retrospective rating plan—Limits ten thousand, twenty thousand and five"—

Q. Retrospective—

A. Wait and let me finish. Estimated annual gross earnings, \$1,500,000. Rate per \$100 of gross earnings, \$2. Estimated annual premium, \$30,000. But then it goes on and breaks it down, the Division No. 2, Excess Limits. In other words, the purpose of this endorsement is that your excess limit is a guaranteed limit on the guaranteed rate. It had to be broken down into this endorsement to show the retrospective rate, that is, the rate of \$2, subject to the signing of the agreement.

Q. In other words, the retrospective rating plan which has reference to Division 1 has reference to the speculative agreement of the same date, has it not?

A. The premium.

Q. Yes. I mean, the retrospective arrangement or plan mentioned here has reference to the retrospective agreement which is dated September 1, 1946, the same date as the policy; that is true, isn't it?

A. Yes.

Q. Is it a fact that this endorsement, Retrospective Rating Plan, was upon this policy at the time you delivered it to Mr. Cantlen?

A. I assume that all these endorsements were attached to the [65] policy.

(Testimony of Charles A. Mettalia.)

Q. The fact is that this endorsement that had application to the retrospective rating plan on Division 1 was upon the policy at the time it was delivered? A. On SPL-20950.

Q. Now, Mr. Mettalia, I call your attention to this language of the retrospective agreement, which is Defendants' Exhibit C: "Whereas, at the special instance and request of the insured and upon the security of this agreement, the company is about to issue to the insured the following policy: Automobile Liability Policy No. SPL-20968." This policy No. SPL-20968 referred to in the retrospective agreement is the same policy numbered SPL-20968 which is the Plaintiff's Exhibit 3 in this case, is that correct? A. I believe so.

Q. Mr. Mettalia, you stated that the total claims paid after September 1, 1946, amounted to \$7800?

A. Approximately.

Q. Well, those are your figures, are they not?

A. That is correct, sir.

Q. So far as you know, are they correct?

A. I said approximately \$7800.

Q. That included claims that were sent to all places, not only San Francisco but to all of the offices of the company?

A. That is correct, wherever the accident occurred. [66]

Q. Did that figure \$7800 also include the \$1,-671.77 which you say was paid out by the company as expense in connection with the defense of a lawsuit which resulted favorably to the insured?

(Testimony of Charles A. Mettalia.)

A. I believe so.

Q. So that, then, \$7800 is the total of expense of the company from and after September 1, 1946, in connection with this risk? A. Yes, sir.

Q. And the company has received, you testified, the premium reported by the insured from and after September 1, 1946, the sum of \$9,131.13, is that correct? A. I didn't testify to that, sir.

Q. Well, do you know how much the company has received in premiums that were received by the insured in that—— A. No, I don't.

Q. ——from and after September 1, 1946?

A. No, I don't.

Q. Do you know that that is the amount set forth in your report?

Mr. Murman: That is immaterial.

A. No.

Q. (By Mr. Eisner): Mr. Mettalia, you stated that you delivered these policies No. SPL-20968 and -20950 to Mr. Cantlen, together with the retrospective agreement, on or about October [67] 1. Did you ever ask Mr. Cantlen whether or not he would deliver—whether or not he had delivered either one of these policies to the insured?

A. No, I didn't.

Q. Did Mr. Cantlen ever tell you he had not delivered either policy to the insured?

A. Several months later.

Q. When did Mr. Cantlen tell you first, for the first time, he had never delivered either one of those policies to the insured?

(Testimony of Charles A. Mettalia.)

A. I don't recall ever hearing that statement from Mr. Cantlen.

Q. You said it was told you several months later. Who told you?

A. Several months later when we demanded the retrospective rating agreement to be signed, Mr. Cantlen said that the insured was not in agreement with the—that is, wasn't willing to sign the agreement, and whether or not we could work up or revise or write up a new program, something like that. I don't recall the exact words.

Q. To get this clear, when you say "a few months later" you mean after September 1, 1946?

A. Oh, yes, possibly November.

Q. You demanded of Mr. Cantlen the signing of the retrospective agreement? [68] A. Yes.

Q. That is correct? A. That is correct.

Q. And Mr. Cantlen then told you he couldn't get the retrospective agreement signed, is that true?

A. That is correct.

Q. Did Mr. Cantlen then tell you that he had retained the policies No. SPL-20950 and -20968 in his possession?

A. No, I don't remember that.

Q. What did you mean when you said you learned a few months later Mr. Cantlen had not delivered the policy to the insured?

A. No, I hadn't even finished my answer when you interrupted me.

Q. I am sorry.

A. I repeat what I just mentioned a few minutes

(Testimony of Charles A. Mettalia.)

ago, that several months later Mr. Cantlen, when I approached him on signing the agreement, said that the insured would not sign the agreement, that he felt the rate was too high, something like that, and whether or not we could work up a program on a guaranteed cost basis.

Q. What did you tell Mr. Cantlen then? That you could not?

A. That I would try to work up some guaranteed cost basis, but certainly under no conditions would the rate of \$2 be acceptable as a guaranteed cost policy, bearing in mind that there was a percentage of increase in the entire industry, [69] that is, the automobile business in this State, of approximately 33 per cent, and that if it did go on a guaranteed cost basis it would be in excess of \$2.

Q. In other words, if you did agree on a \$2 rate, there would have to be a retrospective arrangement whereby the ultimate premium would be based on the insurance experience; is that right?

Mr. Murman: That isn't this situation at all.

Q. (By Mr. Eisner): Is that what you mean?

A. More or less that. When you work up a standard premium—bearing in mind that when we work up something that we submit to the Bureau, they are always subject to approval. When we work up a standard premium, that premium is based on more or less a true manual basis for a normal type of classification, normal type of automobile or normal type of any classification that you may insure. When there is something of an un-

(Testimony of Charles A. Mettalia.)

usual exposure, then you work up a program two ways, with a maximum and a minimum, more or less to protect, one, the insured on a guaranteed basis in the event they had losses going in excess of a certain amount, and, two, as a program of successive and possible rate reduction.

Q. That is, what you are just stating, with a possible increase and possible reduction, that has reference to the retrospective rating plan?

A. That is right. You will break it up. [70]

Q. Was that tendered to Mr. Cantlen?

A. Yes.

Q. Mr. Cantlen told you the insured would not agree to that, didn't he? A. That is correct.

Q. Mr. Cantlen told you that the rate was too high, that the insured would not accept such rate, is that it?

A. That is right. He was referring to the maximum.

Q. Then he asked you if you could renegotiate and get something that might be acceptable to the insured? A. That is correct.

Q. Did you have anything else to offer Mr. Cantlen, any different rate than had been submitted?

A. I don't recall, no. We were going to negotiate with the home office, and finally they decided to send out cancellation notices.

Q. In other words, after your conversation with Mr. Cantlen in which he told you, as you stated, that the rate was too high and the client would not agree, you took it up with the home office?

(Testimony of Charles A. Mettalia.)

A. What rate are you referring to? The \$2 or the retrospective plan?

Q. You told me Mr. Cantlen told you that the rate was too high, and that the——

A. The retrospective rating agreement as a whole. In other [71] words, the one, two and three dollar rate. When we did negotiate and talk about a policy, we were talking about the retrospective. Those were the rates. It isn't rates that we were talking about.

Q. From the time of your original negotiations with Mr. Cantlen in the month of August, then, when you talked to him about rates, you were talking to him about a rate that would be adjustable according to the loss experience of the insured?

A. That is correct.

Q. And your conversations with Mr. Cantlen during the month of August, then, and at all times, were based upon a premium that would be ultimately figured upon a rate that would ultimately be determined according to the loss experience of the insured?

A. Correct, providing the insured did agree to it, or providing he would go along on the retrospective agreement.

Q. When you submitted the policies to Mr. Cantlen, you gave to him at the same time the retrospective agreement and the policies?

A. That is correct.

Q. And the policies referred to the retrospective

(Testimony of Charles A. Mettalia.)

agreement and the retrospective agreement vice versa?

A. No, you are wrong. The only thing the policy refers to on the retrospective agreement is the excess policy, so that the excess policy is on a guaranteed cost basis. That is, the [72] policy, the original primary policy does not mention retrospective.

Q. Oh, of course the retrospective rating is set forth in this endorsement to the policy, Mr. Mettalia?

A. This is the excess policy, as regards the automobile portion of this contract primarily. The retrospective rating plan in here, which is Division 1, with our limited standard plan, would be applicable to the ten, twenty, five limit, and the excess limit under Division 2 would apply on a guaranteed cost basis.

Q. I understand that. See if I am correct? On the 20-cent rate the retrospective plan was not applicable?

A. That is correct.

Q. In other words, that was devoted to the guaranteed rate. But on the primary rate, the rate that covered ten to twenty thousand insurance, beyond that the retrospective rating plan was applicable, is that correct?

A. No, it isn't correct. The agreements weren't signed and this rate is only the standard rate, which is a manual rate.

Q. Doesn't the other retrospective rating plan which is referred to, the ten thousand, twenty

(Testimony of Charles A. Mettalia.)

thousand limit, have reference to the retrospective rating plan referred to in this agreement, which is Defendant's Exhibit C?

A. I fail to see where that endorsement refers to that plan.

Q. Was there any other retrospective rating plan that you had [73] spoken of to Mr. Cantlen in your negotiations other than the retrospective rating plan that is set forth in the agreement that you submitted to him and which is Defendant's Exhibit C?

A. No.

Mr. Eisner: I think that is all.

Cross-Examination

By Mr. St. Clair:

Q. I would like to ask Mr. Mettalia a few questions, your Honor.

Q. Mr. Mettalia, when did you come to the San Francisco office? A. November 3, 1945.

Q. Did you immediately assume the position of superintendent of casualty? A. No, I didn't.

Q. Or whatever it is?

A. Casualty superintendent. No, sir.

Q. When did you assume that position?

A. On or about the last week of March, 1946. That was the official date.

Q. Who had preceded you in that position?

A. Maurice Witt.

Q. Did he stay with the company after that?

A. Yes, he did. He is now in our New York office.

(Testimony of Charles A. Mettalia.)

Q. Who is Mr. O'Malley?

A. He was our agency supervisor. [74]

Q. Is he still with the company?

A. No, sir.

Q. Do you know his initials?

A. John O'Malley. I think it is 'John O. No, I don't remember his middle initial. It is John.

Q. Who is Mr. F. L. Anderson?

A. He was our resident manager until January of 1949.

Q. But during the time we are talking about now, was he resident manager? A. Yes.

Q. Does that mean chief executive of the company here in San Francisco? A. Yes, sir.

Q. In the normal routines of your company's business, would letters concerning claims, or, rather, concerning casualty matters that were addressed to Mr. Anderson come to your attention eventually?

A. Yes, sir.

Q. Mr. Mettalia, I show you what purports to be a carbon of correspondence dated July 22, 1946, addressed "Fidelity and Casualty Company, 60 Sansome Street, San Francisco, California, Attention Mr. F. L. Anderson," and ask you if you have seen the original of that letter, or do you know whether it was received by your company?

A. Yes, it was, sir. [75]

Mr. St. Clair: I had intended to offer this for identification, but I will offer it in evidence, your Honor, as 'Third Party Defendants' Exhibit, which would be, I take it——

(Testimony of Charles A. Mettalia.)

The Clerk: Third Party Defendants' Exhibit AA.

Mr. Murman: Are you going to put in the answer to that, too?

Mr. St. Clair: Yes.

Mr. Murman: All right. No objection.

(Letter dated July 22, 1946, to Fidelity and Casualty Company was marked Third Party Defendants' Exhibit AA.)

Q. (By Mr. St. Clair): Mr. Mettalia, was the information requested in that letter prepared?

A. I think it was, I am not sure.

Q. Now, I ask you if that letter served to remind you of any conference that you had with Mr. Cantlen before July 31, 1946?

A. Well, it must have been maybe afterwards. I was in New York until July 28, 1946.

Q. All right. I am not trying to——

A. I don't remember.

Q. Let me show you a letter on the letterhead of the Fidelity and Casualty Company of New York, dated July 31, 1946, purporting to be signed by you, and ask you if that is signed by you.

A. Yes, that was just about the time I arrived.

Mr. St. Clair: We offer the letter as identified by the witness as Third Party Defendants' Exhibit BB. [76]

(The letter was marked Third Party Defendants' Exhibit BB in evidence.)

(Testimony of Charles A. Mettalia.)

The Court: To whom is that addressed?

Mr. St. Clair: To Bayly, Martin & Fay, on Fidelity and Casualty Company letterhead, signed by Mr. Mettalia.

The Witness: That is correct.

Q. (By Mr. St. Clair): I show you, Mr. Mettalia, what purports to be the carbon of a letter addressed to the Fidelity and Casualty Company, signed by Mr. Cantlen on behalf of Bayly, Martin & Fay, dated August 5, 1946, and ask you if you have seen the original of that letter, or was it received by you? A. I believe it was.

Mr. St. Clair: We offer the letter, as identified by the witness, as Third Party Defendants' Exhibit CC.

(The letter was marked Third Party Defendant's Exhibit CC in evidence.)

Q. (By Mr. St. Clair): With these three letters to refresh your memory, Mr. Mettalia, I would like to ask you if you recall an occasion prior to July 31, 1946, at the office of Mr. O'Malley, whom you just identified, where you were called into the office and Mr. Cantlen was there.

A. Yes. As a matter of fact, that conference originated from a letter that I had sent while I was in New York. I had sent a letter, a little pencil memo, so I remember that very [77] well.

Q. That was prior to July 31, wasn't it?

A. About that, yes, I would say.

Q. Would you refer to your letter of July 31?

(Testimony of Charles A. Mettalia.)

Wasn't that letter of July 31 written as a result of that conference? A. Oh, yes, yes.

Q. And referring to your letter of July 31 and to Mr. Cantlen's letter of August 5, I ask you if that refreshes your memory as to another conference held in Mr. O'Malley's office, at which you were there, as was also Mr. Cantlen?

Mr. Murman: You mean subsequently?

Mr. St. Clair: Subsequent to August 5. If it would help Mr. Mettalia's recollection, I would suggest the date of August 15 as the possible date of the second conference.

A. I would say it was. I am not certain, but I know that we had several conferences.

Q. You would not say there wasn't such?

A. Oh, absolutely not; I remember that perfectly.

Q. Referring to the conference that possibly was on August 15, do you recall a claim known as the Peralta case in which there was a large reserve, \$16,000, set up by your company? A. Yes, sir.

Q. Do you recall a conversation concerning that particular reserve on or about August 15 in which that—Do you recall calling the claims man with regard to that particular reserve, [78] discuss as to whether it should be lowered to \$8,000, the reserve. I mean?

Mr. Murman: Is that SPL-1457?

A. That is on the previous, 1945 to 1946 period?

Mr. St. Clair: I assume so.

Q. I am just asking you, Do you recall the con-

(Testimony of Charles A. Mettalia.)

versation? A. No, I really don't.

Q. You don't. Now, let me ask you this: Are you familiar with the names of the companies that belong to this Bureau, whatever it was, that you referred to? A. I can name many of them.

Q. May I ask you, could you, if I gave you some companies, tell me whether they were members or not? A. Yes, sir.

Q. A company called Continental Casualty?

A. I believe so.

Q. Travelers Insurance? A. Yes, sir.

Q. Royal Indemnity? A. Yes, sir.

Q. Great American Insurance Company?

A. Yes, sir.

Q. Pacific Indemnity?

A. I think they are subscribers, sir.

Q. And Pacific Employers? [79]

A. They are also subscribers.

Q. Thank you.

A. There's many more of them.

Q. Now, I would like to ask you, reference to a date of about September 23 and I present you with Plaintiff's Exhibit 4—could have been 3, either. Perhaps that will help you refresh your memory as to a conference, and I would like to ask if you remember a conference in your office with Mr. Cantlen on or about September 23 with regard to the guaranteed rate basis. I believe it was probably the other you testified to a few minutes ago. He came in and asked you for a guaranteed rate?

A. Yes.

(Testimony of Charles A. Mettalia.)

Q. Who was there besides yourself and Mr. Cantlen?

A. I don't think there was anyone else there but Mr. Cantlen and I. I am not sure, though.

Q. And at that time, on February—pardon me; September 23, had the proposed retrospective agreement been drawn?

A. I wouldn't know. I don't know.

Q. It is dated—withdraw that. Looking at that policy which you have in your hand, is there anything you can tell us of the date it was drawn?

A. The policy was typed on September 24, 1946.

Q. I hand you Defendants' Exhibit C, which is the retrospective agreement, and ask you if there is anything you can tell me [80] about the date that was drawn? A. No, sir.

Q. Do you have any way of telling from your files?

A. Not from what we have here now. I don't know.

Q. Could you tell from your files that are not here, that are in your office?

A. I don't know if there are any other files in our office.

Mr. Murman: Mr. St. Clair, isn't there a signature on that?

Mr. St. Clair: There is, indeed, Mr. Murman.

A. If I remember right, Mr. St. Clair, there was originally an error in these agreements, some typographical error, or something of the kind. If I remember right, they were sent back to our home

(Testimony of Charles A. Mettalia.)

office for correction, and to expedite it, expedite the execution of these agreements, I requested that our secretary sign them rather than have the insured sign them first and send them back to New York for the signature. I don't remember how much of a delay there may have been, but maybe a week, two weeks, maybe a month, but I do remember something now that, as to Mr. Robinson's signature, that it indicated to me there was some form of error and it was sent back there to correct it, and I had him sign them rather than sending them out here unsigned, then send them back to New York for signature once again.

Q. Going back to the conference of August 15 at which you and [81] Mr. O'Malley and Mr. Cantlen were present, around August 15, the one I referred to a moment ago when I asked if you recalled the Peralta case—— A. Yes.

Q. At that time and later the plaintiff, Fidelity and Casualty Company, was willing to write this insurance and told Mr. Cantlen?

A. I think so, tentatively, of course.

Q. Do you recall whether they were or not?

A. Yes, I think so.

Q. Would you be willing to say that they were? Or let me put it the other way: Would you say that they were not?

A. This was the second conference?

Q. This was the second conference, yes, sir.

A. I would say we would have a tentative rate from our home office and——

(Testimony of Charles A. Mettalia.)

Q. Let me ask you this, Mr. Mettalia: Have you a picture in your mind of that conference? I am going to ask you something then about the physical end. Have you it physically in mind; the conference? A. Yes.

Q. Do you recall whether or not notes were taken by Mr. Cantlen as to these rates that you were offering?

A. Yes, I think he worked up a work sheet that day.

Q. You have a recollection of that? [82]

A. That is correct.

Q. It would be your present testimony that Mr. Cantlen took that work sheet away with him?

A. I think so.

Q. Now, in that conversation of August 15 in which Mr. Cantlen took away the work sheet, at that time these three rates, \$1, \$2, and \$3 rates, were talked about? A. Yes.

Q. And they were told to Mr. Cantlen?

A. They would have to be, otherwise we couldn't work up the work sheet. I remember we worked that way. We couldn't use that work sheet unless we had that rate.

Q. Then whenever the policies were drawn up physically, and whenever the agreement, the retrospective agreement, was drawn up, were they drawn up exactly in conformity with that original conference of October 15? A. Yes.

Q. That is your present recollection, in any event? A. Yes.

(Testimony of Charles A. Mettalia.)

Mr. St. Clair: That is all I have, your Honor.

Mr. Eisner: I have just a couple of more questions.

Mr. Murman: Well, let me ask him first.

Redirect Examination

By Mr. Murman:

Q. Mr. Mettalia, in answer to a question Mr. Eisner propounded to you, you said \$7800 you mentioned as [83] having been paid for the claims was all the amount paid out. Was that with reference to claims alone? A. \$78,000?

Q. \$7800.

A. That figure would be moneys paid in claims and expenses, of course.

Q. Expenses in connection with claims?

A. That is right.

Q. That had nothing to do with the acquisition cost? A. Oh, absolutely not.

Q. Or engineering cost? A. No, sir.

Q. So that that figure does not stand by itself as the only out-of-pocket payments of the company?

A. No, sir. We in the insurance field have three costs, sometimes more than three. Production, acquisition cost, and legal cost such as handling claims.

Q. So this \$7800 is just one of three?

A. That is only attorney or legal expenses in connection with claims. In addition to that you have production cost, which averages about 13 to 14 per cent.

(Testimony of Charles A. Mettalia.)

Q. Of what?

A. Of a dollar income. Then you have acquisition cost, which is based on about 11 per cent, 10 per cent. I think in this case our production cost was about 13 per cent. [84]

Q. Of each dollar that the company took in?

A. That is correct.

Q. Just to clarify it, because there may have been some misunderstanding during the questioning by Mr. Eisner, inadvertent though it may have been, this notice, Plaintiff's Exhibit 1, which was sent to the rating bureau, that was sent after you and Mr. Cantlen had your conference you just talked about and had worked up a premium rate on the work sheet, isn't that right? A. Yes, sir.

Q. That conference, in turn, preceded the filing with the Railroad Commission and the ICC and the issuance of the binder, isn't that right?

A. Yes.

Q. There was another conference with Mr. Cantlen regarding rates following the approval of this, but as I understand your statement the policies were written up following the approval in connection with that original meeting of about August 15?

A. There may have been conferences after this rating was approved.

Q. As to change of rate?

A. As to change of rate. That is possible. I am not sure of any dates, but I do remember a conference with Mr. Cantlen after these rates were

(Testimony of Charles A. Mettalia.)

agreed upon. There was a [85] request for a change of some kind.

Q. Oh, yes, but between the date you and Mr. Cautlen talked, the time that the bureau approved, and the time that the policies, Plaintiff's Exhibits 3 and 4, were written up there was no change?

A. No.

Q. If there was any conversation about this rate, so far as your mentioning the standard rate, that came afterwards?

A. Yes. We would not have any authority to deliver that—we could deliver it, but wouldn't have any authority to use any other rate other than what we used in this.

Q. Which the Bureau approved?

A. That is correct.

Q. This endorsement No. 8 that has been called to your attention on the excess policy relating to the retrospective rate plan, did I understand you correctly to say that was there for the purpose of clearly setting forth that the rate is the excess of your standard rate?

A. Both rates are really standard rates.

Q. But the excess rate——

A. The purpose of this was really to make your excess limit a guaranteed cost basis so that we wouldn't be penalizing the insured in the event of a catastrophic loss.

Q. Then the claim that it is there to show an excess guaranteed rate, that can't be changed by anything, is that correct? [86]

(Testimony of Charles A. Mettalia.)

A. That is right.

Q. And that there was in the primary some negotiation regarding a speculative arrangement which had no relation to the excess, is that correct?

A. That is correct.

Mr. Murman: I have no further questions.

Recross-Examination

By Mr. Eisner:

Q. Just one or two questions. Did I understand you, Mr. Mettalia, that the policies went back to New York for signature? A. No, sir.

Q. Did I understand you that the retrospective agreement went back to New York for signature?

A. Yes, sir. Not for signature.

Q. For approval?

A. There was a slight typographical error in the agreements, so when I sent them back to New York I wrote the boys to have one of the officials of the company sign it rather than have it come back, or retyped and have it signed here, then go back for an official signature. You see, any insurance policy on an investment of that type, we as employees have no authority to sign it. They must be signed by an officer of the company. So, to expedite that mailing back and forth, I suggested Mr. Robinson or one of the officers sign that agreement. The policies never go back—I mean, we have [87] counter-signature authority to sign the policy.

(Testimony of Charles A. Mettalia.)

Q. But it differs in that respect with a retrospective agreement?

A. Your retrospective agreement has no provision for counter-signature.

Q. So that you sent the retrospective agreement back to New York for signature?

A. That is right, where the agreement was originally typed.

Q. Oh, the agreement was drawn up in New York?

A. That is correct.

Q. It was not drawn up in San Francisco, it was drawn up in the home office?

A. Yes. We have no officer in San Francisco, you see.

Q. Then as I understand it, this defendant's Exhibit C was drawn up in New York and sent out to your company, to the agency in San Francisco?

A. Branch office.

Q. To the branch office in San Francisco?

A. Yes, sir.

Q. And when it came out it was signed by the home office, was it, signed by an officer of the company in New York?

A. Not originally. It wasn't signed by anyone in New York. When we received it here, I believe someone—I don't know if it was an underwriter or someone, found a slight error in some of the figures and I sent back to be corrected and have it [88] signed by an officer so that we would eliminate that waste of time by having it signed by the insured, then having it sent back to New York to be

(Testimony of Charles A. Mettalia.)

signed by one of the officers, and then delivered to the insured.

Q. Where is Mr. Robinson? Is he in New York?

A. Yes, sir. He is a vice president.

Q. His signature to this Defendant's Exhibit C of "H. S. Robinson," as I read it, was affixed in New York and sent out to the branch office in San Francisco, is that true? A. That is right.

Q. At the branch office you had in your possession, returned from New York, this Plaintiff's Exhibit C—Defendant's Exhibit C, at the time that you delivered the two policies to Mr. Cantlen?

A. We had this in our possession?

Q. Yes, at the time you delivered the two policies to Mr. Cantlen, on or about October 1, you had by that time received back from New York——

A. Possibly.

Q. ——the corrected Exhibit C bearing the signature of Mr. Robinson? A. I believe so.

Q. To your knowledge, did the Fidelity and Casualty Company make any demand upon the insured or upon Bayly, Martin & Fay for any additional premium other than what the insured had [89] remitted monthly from September 1 prior to the month of October, 1947?

A. I couldn't answer that, sir.

Q. I mean so far as you know.

A. I don't know.

Q. Was there any request made by the Fidelity and Casualty Company for any additional premiums prior to the month of October, 1947?

A. I don't know. That is still another division

(Testimony of Charles A. Mettalia.)

of our organization. I have nothing to do with the premiums.

Mr. Eisner: That is all.

Mr. Murman: That is all. Do you have any further questions?

Mr. St. Clair: I would like to clarify one thing, your Honor, if I may.

Q. Mr. Mettalia, did I understand that, within your intracompany organization, that this matter of fixing of the rate—where was that determined? Here? These rates which you were going to charge the California Motor Transport.

A. It is a combination of things, sir. We work up our loss ratio and we submit our facts to our home office to see whether or not our figures are correct. When we get all that information, then we submit all this in this form to the National Bureau here in San Francisco, they having the final word as to whether we can use that rate. If they say no, it is no. [90]

Q. I mean as within your company.

A. Within the company we don't—we just have to judge based on our experience.

Q. Did you have any authority to change that \$2 rate, for instance, you personally? A. No, sir.

Q. Did you have any authority to change the \$1 or \$3 limits? A. No, sir.

Q. That would be determined by the New York office? A. No.

Q. I mean combination of the two. I see what you mean.

(Testimony of Charles A. Mettalia.)

A. They could suggest. Our home office would only suggest, but the governing office would still be the National Bureau.

Q. I understand, but as within your company did you have an authority to say what was going to be filed with the Bureau?

A. Well, more or less, I would say, yes. Yes.

Mr. St. Clair: That is what wasn't clear to me.

Further Redirect Examination

By Mr. Murman:

Q. But you had to get approval from someone before you could ask?

A. Had someone in our home office given us authority, I will; but many times we in our branch office would rather write someone, submit the case to the home office.

Q. In this particular instance you did that, did you not?

A. Oh, yes. We closely corresponded with the home office and [91] they discussed it with me personally on my visits to the home office.

Q. If the home office approved, you then submit it to the Bureau and ask the Bureau's approval?

A. That is correct.

Mr. Murman: That is all.

Mr. St. Clair: That is all.

(Witness excused.)

Mr. St. Clair: May I ask Mr. Murman if Mr. Mettalia will be here later at the trial?

Mr. Murman: Oh, yes, he will be here.

C. A. CHALLBURG

called for the plaintiff; sworn.

The Clerk: State your name, please.

The Witness: C. A. Challburg.

Direct Examination

By Mr. Murman:

Q. What is your business?

A. Auditor for the Fidelity and Casualty Company.

Q. How long have you been so employed?

A. Twenty years.

Q. Are you presently employed as such?

A. Yes, sir.

Q. Were you employed in that connection during the years 1946 and 1947? [92]

A. I was.

Q. I show you, Mr. Challburg, what purports to be a series of documents consisting of gross receipts reports from the defendants in this case to the Fidelity and Casualty Company under SPL-20950 and SPL-20968, and ask you to look at them to determine whether or not those reports were received by you.

A. They were, yes.

Mr. Murman: At this time, if the Court please, I offer in evidence these reports, collectively, as one exhibit. They are dated September, 1946, October, 1946, November, 1946, December, 1946, January 1 to 19, 1947.

(The reports were marked Plaintiff's Exhibit 10 in evidence.)

(Testimony of C. A. Challburg.)

Q. (By Mr. Murman): Mr. Challburg, what did you do on each occasion that you received one of those reports?

A. An audit statment was typed and sent to the assured—pardon me; sent to the broker, and a copy sent to our accounting department in order to set up the charge.

Q. In making up the audit statement did you use the figures submitted to the plaintiff on these gross receipts reports Plaintiff's Exhibit 10?

A. Right.

Q. The audit report, then, that you made up was notice of confirmation—— [93]

Mr. Eisner: If you please, counsel, I haven't followed that last question.

The Court: Reframe the question.

Mr. Murman: Yes.

Q. Did the audit statement you made up confirm these gross receipts reports as being correct?

A. Well, except that was a voluntary, subject to final audit.

Q. Based on figures submitted in these particular reports? A. That is right.

Q. All of the figures? A. Right.

Q. They do constitute that type of report I just mentioned, confirmation of the figures shown here?

A. That is right, yes.

Q. I show you what purports to be the statements that you just mentioned, audit reports, I think you call them. A. That is right.

Q. And ask you to state whether or not those are

(Testimony of C. A. Challburg.)

the audit reports based on the gross receipts reports which you previously identified and that bear Plaintiff's Exhibit No. 10. A. They are.

Q. I note, Mr. Challburg, that whereas there are five gross receipts reports, there are only four audit reports. Can you explain that?

A. The last one of the reports wasn't billed due to the fact [94] that it is taken care of in the final audit.

Q. When you say the last one, are you referring to the gross receipts report shown on Plaintiff's Exhibit 10? A. That is right.

Q. Dated what?

A. Dated January 1 to January 19, 1947.

Mr. Murman: At this time, if the Court please, I offer in evidence as plaintiff's exhibit next in order the audit reports identified by the witness.

(The reports were marked Plaintiff's Exhibit 11 in evidence.)

The Court: In other words, you have got to get these gross receipts reports from either the defendant or his broker? A. That is right.

Q. Then you take them and send that to the auditing department and also to the accounting department?

A. Send a copy of this statement we make up—we make this statement and send a copy.

Q. What is the other statment?

(Testimony of C. A. Challburg.)

A. More or less of a copy of the report received from them.

Q. You send one to the broker and one to the auditing department? A. That is right.

Q. And one to the accounting department?

A. That is right. [95]

Q. And they make the bill up in the accounting department? A. That is right, sir.

Q. (By Mr. Murman): Mr. Challburg, did you make a final audit in this particular case involving these defendants in connection with Policy No. SPL-20950 and SPL-20968? A. I did.

Q. Where was that audit made?

A. At the company—at the California Motor Transport office.

Q. That is in the office of the defendants?

A. That is right.

Q. Was it made in the presence of someone there? A. Yes.

The Court: What time was that?

Mr. Murman: I was going to develop that, your Honor.

Q. I show you, Mr. Challburg, what purports to be an audit made by you in response to a payroll audit requisition, and ask you to state whether or not those documents constitute the audit, the final audit made by you. A. That is right.

Q. And in whose presence, can you state, was the audit made? A. Mr. Davis.

(Testimony of C. A. Challburg.)

Q. As one of the California Motor Transport, he signed, did he, in your presence?

A. That is right. [96]

Q. His signature appears right on there?

A. Yes.

Q. There is a date on there of April 2, 1949?

A. That is right.

Q. Is that the date he signed?

A. That is the date the audit was made.

Q. That is the date the audit was made. I note, Mr. Challburg, that these audits appear to be carbon copies. Do you know where the originals are?

A. The originals are at our home office in New York.

Q. Can you tell by looking at these audits, in fact, they are true carbon copies?

A. Yes, they are.

Q. Everything appearing there in the carbon was placed on there when?

A. Placed on the date April 2, 1947.

Q. That is the date you made the audit?

A. That is right.

Q. There are certain things penciled on there. Was that on there at the time you made the audit?

A. No, this was filled in later for the payments.

Q. Do you know who filled that in later?

A. No, I don't know. It would be probably one of the clerks in the auditing department.

Q. It wasn't filled in by you? [97] A. No.

Q. But the other figures on here in carbon were made by you? A. That is correct.

(Testimony of C. A. Challburg.)

Mr. Murman: At this time, if the Court please, I offer in evidence as plaintiff's exhibit next in order the audits identified by the witness, and ask that they be so marked.

The Clerk: Plaintiff's Exhibit 12 in evidence.

(The audit reports were marked Plaintiff's Exhibit 12 in evidence.)

Mr. Murman: If the Court please, I would like to read from part of this, the first of it. The first one refers to SPL-20950 and reads:

"Assured, California Motor Transport Company, Ltd.; Address, 625 Brannan Street, San Francisco; Effective 9/1/46; Expires 1/21/47; Agent or broker, Bayly, Martin & Fay; Canceled 1/21/47, by notice."

Then there are working classifications: Truckmen, clerical office, salesmen,—I will have to ask you, Mr. Challburg, to interpret the writing. What is that?

A. "Owners Protective."

Q. Then one more, "Contractual"?

A. That is right.

Mr. Murman: Opposite each of those is the amount of the audit, the rates, and the earned premium, showing a total earned premium on the excess policy of \$1,891.48. [98]

The Court: Is that the one signed by Mr. Davis?

Mr. Murman: Yes, your Honor, that first sheet is signed by Mr. Challburg. The entire audit is signed by Mr. Davis covering both policies.

(Testimony of C. A. Challburg.)

Q. As I recall, there was another audit for which the premium was calculated as to both policies, isn't that right?

A. That is right.

Q. The second audit refers to the primary policy, SPL-20968, and it sets forth automobile receipts, amount, and the earned premium of \$1,508.64. That is taken from the audit itself, isn't that right, Mr. Challburg?

A. It will be taken from the figures, yes. Here is your gross figures here, see? Just carried forward on this 746.

Q. That is the audit that refers to the primary policy of SPL-20968, isn't that correct?

A. That is right.

Q. That is on this sheet Mr. Davis signed?

A. Right.

Q. These other figures——?

A. The other figures are all the sums of these.

Q. For the different periods?

A. No, for the different lines, the different truck lines.

Q. I see. Each one sets forth California Motors, Red Line Transfer, Red Line San Francisco, Sunset, Coast Line, and so forth? [99]

A. That is right. And the second sheet is the payroll, the shop payroll, salesman payroll, office payroll.

Q. Where does it show that?

A. That is carried forward onto this section here. 136,339, and so forth down.

Q. And you are referring to the excess——

(Testimony of C. A. Challburg.)

A. That is right.

Q. —20950. Then based on those figures you compute the premium, is that correct?

A. That is right.

Q. That is shown here on the face of the exhibit as 1891.48? A. That is right.

The Court: That is covered by one count of the complaint?

Mr. Murman: That is the second count. 1508.16 is the second one? A. That is right.

Mr. Murman: That is the first count of the complaint. That is the total premium, your Honor, subtracted from what is paid on the voluntary reports.

The Court: I see, to the amount of about \$5300.

Mr. Murman: No; \$5,950.52.

Q. Isn't that shown here?

A. That is right.

Q. When that information was developed on the final audit, Mr. Challburg, what did you do with that information? [100]

A. Sent out copies to the broker and also to our accounts department.

The Court: Let me see that exhibit, will you?

Q. (By Mr. Murman): Now, Mr. Challburg, I show you what purports to be copies of the audit report which was just referred to as having been sent out to the broker and to the cashier, and ask you if you identify them as such? A. They are.

Q. And the date that appears on here is October 22, 1947. Do you recall that as being the date? I understand, Mr. Challburg, that there may have

(Testimony of C. A. Challburg.)

been two audit reports? A. I think so, yes.

Mr. Murman: I will withdraw these for the moment, then, and take up the earlier ones.

Mr. Eisner: I don't understand. What are you withdrawing?

Mr. Murman: The ones I had are a later date. These are the ones he apparently sent out because the audit was made in April of 1947. These are a later date.

Mr. Eisner: You say the audit was made in April, 1947?

Mr. Murman: Yes. Isn't that it? I think Mr. Challburg testified the audit was made——

The Court: It was dated April 2, 1947.

Q. (By Mr. Murman): Yes. And the audit was made on the date you signed it? [101] A. Yes.

Mr. Murman: And that is April 2, 1947. That is on the bills here. You see they are dated April 2, 1947 (handing documents to counsel).

Q. Exclusive of these covering statements, Mr. Challburg, I show you what purports to be the audit statement that you referred to as having been sent to your broker and the cashier.

A. I would say they were, that is right.

Q. Those were made up in your department, were they? A. Yes.

Q. They were based on your audit?

A. That is right.

Q. These were sent to the broker and the cashier in your own office? A. Yes.

(Testimony of C. A. Challburg.)

Q. The broker, you mean Bayly, Martin & Fay, as appear here? A. That is right.

Mr. Murman: Now, your Honor, there is attached to these audit reports since they have been furnished to me by Mr. St. Clair some statements, one statement as addressed by Bayly, Martin & Fay to California Motor Transport Company. I have no objection to those remaining on the exhibit, and I am willing that the exhibit go in evidence in its entirety, with [102] the understanding that we are furnishing the audit report, but that the bill which appears there is being furnished by the third party defendant.

The Court: All right.

Mr. Murman: Is that correct?

Mr. St. Clair: Yes. If satisfactory with Mr. Eisner, it would be better to do it that way because they have a relevancy later, tied together.

The Court: That is all right. It is all Exhibit 13?

Mr. Murman: Yes. We are only responsible for one part and the third party defendant are responsible for the other part.

The Clerk: Plaintiff's Exhibit 13 in evidence. I will clip these together so they won't get separated.

(The documents were marked Plaintiff's Exhibit 13 in evidence.)

The Court: In other words, these audits here are really bills computed and show what the premium is. They were prepared by your office, Mr. Challburg?

The Witness: That is right, sir.

(Testimony of C. A. Challburg.)

The Court: Then the bill that was sent out of your office, of course, was sent by Bayly, Martin & Fay to the defendants?

Mr. Murman: That is correct, your Honor. We supplied the broker with the audit report and he made up the bill from the [103] report; that is the way I understand it.

Mr. St. Clair: That is right.

Mr. Eisner: Of course, we don't accept the statement as correct as to what actually occurred.

Mr. Murman: That will be developed further. We can only go as far as the audit statements at this time.

Mr. Eisner: Can I have the bills dated October 22, 1947?

Mr. Murman: We are going to put them in evidence. I have withdrawn them.

Mr. Eisner: I would like to have them. Your complaint recites demand was first made October 22.

Mr. Murman: It was based on these, but I understand that the actual bill was sent out on April 17, which we have here.

Mr. Eisner: Has anyone said it was—that the bill was sent on April 17?

Mr. Murman: Mr. Challburg just identified it as having been made up at that time.

Mr. Eisner: Has anyone said any bill was mailed to the insured on April 17?

Mr. Murman: Let's ask him.

(Testimony of C. A. Challburg.)

The Witness: The date the bill was made up in our department, that day.

Q. (By Mr. Murman): When were they sent out? A. Possibly the same day. [104]

Q. You mean there may have been a day or two delay? A. A day delay, possibly.

Mr. Eisner: May I ask to whom they were sent, Mr. Challburg, to Bayly, Martin & Fay or to whom?

The Witness: To Bayly, Martin & Fay.

Mr. Eisner: Well, pardon me for the interruption.

Mr. Murman: That is all right.

Mr. Eisner: Do you know when that bill was mailed first to the insured?

The Witness: No. All our bills go to the broker, Bayly, Martin & Fay.

Q. (By Mr. Murman): They went out on or about the date shown in the audit report?

A. That is right.

The Court: Where did you get those bills from?

Mr. Murman: Mr. St. Clair furnished them. I got these reports from him because we had furnished them to him and I didn't have them in my file. I had the later report.

The Court: The bills, I mean, that were addressed by Bayly, Martin & Fay to the defendant.

Mr. Murman: They were furnished me by Mr. St. Clair just now when he furnished me these audit reports, which we in turn had sent to the broker.

Mr. St. Clair: I merely ask that they be kept together because they have a relevancy together later. [105]

(Testimony of C. A. Challburg.)

The Court: Whose possession did they come from?

Mr. St. Clair: Our possession. The entire Exhibit 13 was in the files of Bayly, Martin & Fay.

The Court: Is that a carbon copy of the bill or the original of the bill?

Mr. Murman: You can tell better than I, Mr. St. Clair.

Mr. St. Clair: I am informed it is the original which got back into the Bayly, Martin & Fay files through a procedure that will appear later.

Mr. Eisner: That is an affirmation, that it came from the Bayly, Martin & Fay files, if it ever went out of there.

Mr. Murman: You may cross-examine.

Cross-Examination

By Mr. Eisner:

Q. Now, Mr. Challburg, first of all, there has been produced here Plaintiff's Exhibit 10, which purports to be a statement of gross receipts, a gross receipt report sent by Bayly, Martin & Fay to the Fidelity and Casualty Company for the month of September, 1946, October, 1946, November, 1946, December, 1946, and January 1 to January 19, 1947. Now, then, can you tell me when these reports were received by Fidelity and Casualty from Bayly, Martin & Fay?

A. I can tell you approximately, if you get a copy of the voluntary report.

Mr. Eisner: Yes. Counsel, do you have that?

(Testimony of C. A. Challburg.)

Mr. Murman: They are in evidence here. [106]

The Court: Will you give me that exhibit number? 10?

Mr. Eisner: I don't think that went in.

Mr. Murman: What did you ask?

The witness: Copy of the voluntary monthly statement that we send.

Mr. Murman: Oh, I see.

Mr. Eisner: The statements that were sent to you were by Bayly, Martin & Fay accompanying those reports. Is that what you are asking for?

A. No.

Q. At the time Bayly, Martin & Fay sent you—I mean the company—— A. Yes.

Q. ——these statements, there was also a communication sent by Bayly, Martin & Fay that these reports accompanied, isn't that right?

A. That I don't know. This is all the audit department gets.

Mr. Murman: This is what you are referring to, isn't it?

The Witness: Yes.

Q. (By Mr. Eisner): Mr. Challburg, now, can't you tell me whether or not the report for the month of September was received in the month of October or November?

A. I can tell from the copies of those.

Q. All right. [107]

A. Apparently there were three of them billed here at one time.

Q. When were they sent you? When I say

(Testimony of C. A. Challburg.)

“you” I mean the company.

A. Sometime—February 15 is the date of the audit statement.

Q. February 15, 1947? A. 1947.

Q. Then did I understand that the first time that Fidelity and Casualty Company received any report from Bayly, Martin & Fay for the September gross receipts of premium was in February, February 15, 1947? A. That is all I can answer there.

Q. And on February 15, 1947, did Bayly, Martin & Fay forward to Fidelity and Casualty Company at one time the report for September, 1946, October, 1946, November, 1946, and December, 1946?

A. That I can't answer.

Q. What part of it can't you answer?

A. All I can answer is the date of the audit statement.

Q. As I understand it, the dates of the audit statement that you have here represent the dates that these reports of gross receipts were received by Fidelity and Casualty Company from Bayly, Martin & Fay? A. Possibly so.

Q. Well, isn't that your testimony? [108]

A. I said I can't tell you. I don't know.

Q. Is that your best recollection?

A. Yes, to the best of my recollection those are the dates there.

Q. According to the dates that are there, is it a fact that the reports for September, October, November, December, 1946, were sent at one time by Bayly, Martin & Fay on February 15, 1947?

A. That—sent to who by who?

(Testimony of C. A. Challburg.)

Q. Sent to Fidelity and Casualty Company by Bayly, Martin & Fay.

A. That I don't know. Apparently from the audit statements, yes. Apparently, from these.

Q. That is your conclusion from this?

Mr. Murman: Is that the witness' conclusion?

Mr. Eisner: I call upon counsel to produce—they have had notice to produce—I call upon them to produce the reports, original reports from Bayly, Martin & Fay, and these reports, each one was accompanied by a letter, which I have a copy of, from Bayly, Martin & Fay.

Mr. Murman: We have produced those reports which now constitute Plaintiff's Exhibit 10 as the only reports in our possession.

Q. (By Mr. Eisner): Well, Mr. Challburg, I ask you to look—— [109]

Mr. Murman: May I see those, counsel? I haven't seen those before.

Mr. St. Clair: I might say, Mr. Eisner, when your demand was made on Mr. Murman for these letters of transmittal, he informed me he could not find them in his file, and I agreed to have here the copies of the letters of transmittal. I have them here.

Mr. Murman: I had overlooked that. Yes, I did ask Mr. St. Clair to produce them.

Mr. Eisner: Would you mind producing the copies of the letters of transmittal?

Mr. St. Clair: Not at all. I have been waiting

(Testimony of C. A. Challburg.)

patiently for an opportunity so to do. They are in the bound file for which you also made a demand on me, Mr. Eisner, so whatever is the simplest way from an evidentiary point of view. Be careful, there are vouchers attached.

The Court: How many letters?

Mr. St. Clair: There are five, sir.

Mr. Murman: One with each voluntary report, your Honor, I assume. I have never seen them myself.

Q. (By Mr. Eisner): Now, Mr. Challburg, I show you a copy of a letter dated January 27, 1947, and ask you if that refreshes your recollection that the report for the month of September and the report for the month of October, 1946, were forwarded to the Fidelity and Casualty Company by Bayly, Martin [110] & Fay under date of January 27, 1947.

A. According to that copy, yes. Of course, we wouldn't probably even seen—I mean, they probably never even kept our copy of the letter.

Q. What letter do you refer to?

A. This (indicating).

Q. You didn't keep it?

A. Probably the clerk in the audit department.

Q. You mean at Fidelity and Casualty Company? A. That is right.

Q. The original. I show you a copy of a letter from Bayly, Martin & Fay to Fidelity and Casualty Company dated January 30, 1947, and ask you if that refreshes your recollection that under that date

(Testimony of C. A. Challburg.)

Bayly, Martin & Fay forwarded the gross receipts report for the month of November, 1946.

A. It is possible, yes; it is possible.

Q. I call your attention to the letter, copy of letter, dated February 24, 1947, and ask you if it is a fact that under that date Bayly, Martin & Fay forwarded to Fidelity and Casualty Company the gross receipts report of the California Motor Transport for the month of December, 1946.

A. That is possible, yes. This was billed February 7.

Q. I show you a communication dated March 27, 1947, and ask you if under that date Bayly, Martin & Fay forwarded to Fidelity and Casualty Company gross receipts report for [111] California Motor Transport for the period January 1 to 19, 1947.

A. That is right, sir.

Q. Now, then, Mr. Challburg, when these reports that were forwarded by Bayly, Martin & Fay came to the Fidelity and Casualty Company, were they referred to you as auditor?

A. No, they wouldn't be.

Q. To whom would they go?

A. To the clerk in the audit department.

Q. Does he serve under you?

A. Yes, that is right, sir.

Q. Then do they come to you as auditor?

A. Not until the final audit.

Q. Let me ask you, then, how many people are in your audit department?

A. At that time we had three.

Q. They were working under you?

(Testimony of C. A. Challburg.)

A. That is right.

Q. Then what was the duty of the clerk who was working under you with reference to gross receipts reports?

A. Just check extensions and see the audit statement was made up.

Q. I call your attention to the fact that in the gross receipts, September, 1946, this gross receipts report shows the gross revenue, the primary public liability at the rate of [112] .997, and property damage at .226, and with extensions showing the premium earned at that rate on the gross receipts.

A. Yes.

Q. Did you observe that?

A. That is right.

Q. Did you observe that when it was received?

A. No, we never check that until the final audit.

Q. Do you mean to say, Mr. Challburg, no one in your department, when the statement is received of gross receipts showing the rate of premium that is figured upon the gross receipts, checks the rate and premium to see whether it is correct?

A. Not until the final audit.

Q. Do you send out bills based on this statement? A. That is right.

Q. I call your attention to the fact that down there, written on the bottom of each sheet of Plaintiff's Exhibit 10, a calculation in handwriting, \$200,910 on September, 1946—this is the first sheet attached to this exhibit—a figure \$200,910.08 at .997, \$2,003.07. Whose writing is that?

(Testimony of C. A. Challburg.)

A. That would be the clerk in the audit department.

Q. Who works under you?

A. That is right.

Q. I call your attention to the figure below, \$200,910.08 at .226, \$454.06. Is that also in the handwriting of the clerk?

A. That is right. [113]

Q. \$2,457.13, and then the word "Paid." Is that in the handwriting of the auditor?

A. Of the clerk.

Q. Can you tell me when that \$2,457.13 was paid? A. No, I can't.

Q. As I understand, Mr. Challburg, after these reports, gross receipts reports, were received, what was done with them after they were in the hands of your clerk?

A. They were filed away until final audit is made.

Q. Based on these reports, do I understand that you then made out bills, these statements which are Plaintiff's Exhibit 11? A. That is right.

Q. Those were made out in your department?

A. That is right.

Q. Those bills are based—the same amounts shown upon them, shown upon the gross receipts reports as filed with you by Bayly, Martin & Fay?

A. That is right.

Q. I see here a bill dated February 15, 1947, for \$2,457.13. You are familiar with the fact that your policy and the form, furthermore, whether 1457 or 2956, all your policies provide that the monthly

(Testimony of C. A. Challburg.)

report shall be made on the premium during the preceding month and remittance made to you, are you? A. Yes. [114]

Mr. Murman: I object to that on the ground the policy is the best evidence.

Mr. Eisner: Well, it is preliminary.

The Court: Well, it is all right.

Q. (By Mr. Eisner): Now, then, Mr. Challburg, are you familiar with the fact that the California Motor Transport Company had forwarded and paid to Bayly, Martin & Fay the premiums that are referred to in these bills months prior to February 15, 1947?

Mr. Murman: Objected to as calling for a conclusion of the witness.

Q. (By Mr. Eisner): Do you know that?

Mr. Murman: Also, it calls for hearsay.

The Court: He is asking him if he knows. If he doesn't know he can say so.

A. I don't know.

The Court: I don't see how he would know, myself.

Q. (By Mr. Eisner): Is it the practice of the agent, or Bayly, Martin & Fay, to remit premiums together with the gross receipts reports?

A. I don't know.

Q. What was done with this bill?

A. They were sent out to the agent, broker.

Q. Bills were made for the California Motor Transport Company. Was there any bill sent to them? [115]

(Testimony of C. A. Challburg.)

A. Not to my knowledge. Not from Fidelity and Casualty Company, I mean.

Q. Not from the Fidelity and Casualty Company? A. That is right.

Q. Now, then, you made the final audit of the records of the California Motor Transport Company when? A. April 2, 1947.

Mr. Eisner: Do you have that audit, counsel?

Mr. Murman: It is in evidence as Plaintiff's Exhibit 12. Here it is.

Q. (By Mr. Eisner): Now, then, Mr. Challburg, I understand that in April, 1947, you went down to the office of the California Motor Transport Company? A. Right.

Q. Did you go personally? A. Yes, sir.

Q. Was the purpose of your visit to the office of the California Motor Transport Company to check the gross receipts of the California Motor Transport Company from September 1, 1946, until January 21, 1947? A. Right.

Q. You went down to ascertain whether or not the gross receipts as reported by Bayly, Martin & Fay to the Fidelity and Casualty Company, as shown upon Plaintiff's Exhibit 10, were correct?

A. Right.

Q. And when you went to the California Motor Transport Company, you there saw Mr. Davis, who was the auditor— A. Right.

Q. —of the California Motor Transport Company, and you made out these—worked out something that was signed by Mr. Davis?

(Testimony of C. A. Challburg.)

A. That is right, sir.

Q. I will ask you if when this signature of Mr. Davis was appended to the second page of Plaintiff's Exhibit 12 there was anything upon this sheet with the exception of the figure showing the gross receipts.

A. That I don't know; I don't remember.

Q. You don't remember? A. No.

Q. Can you state whether or not any of the extensions, or anything that is written upon Plaintiff's Exhibit 12 other than the gross receipts were upon that exhibit at the time it was signed by Mr. Davis? A. May I have that again?

Mr. Eisner: Will you read it, please?

(Question read.)

A. No. Just the first sheet, you mean?

Q. Yes, I mean just the sheet that was signed by Mr. Davis. A. That is right. [117]

Q. Now, how about the other sheets with it? Were there any extensions or anything upon the document you showed to Mr. Davis other than the gross receipts for his approval?

A. That is all.

Q. The only thing you showed Mr. Davis for his approval were gross receipts whether or not they were correct, as you took them from the books of the California Motor Transport Company?

A. That is right.

Q. And Mr. Davis then appended his signature approving your figure as correct? A. Yes.

Q. Now, then, Mr. Challburg, your policies in

(Testimony of C. A. Challburg.)

numerous instances provide for a deposit premium, do they not? A. Yes, they do.

Q. Is it part of the auditor's business to collect those deposit premiums? A. It is not.

Q. Does the auditor have any records of the deposit premiums? A. He does not.

Q. Whose business is it in the company to see that the deposit premiums that are called for by the policy are paid? A. That is up to the cashier.

Q. The cashier? A. That is right.

Q. The auditor has nothing, no record of it?

A. He gets a record after the final audit, yes.

Q. Doesn't the auditor receive a charge—I am no auditor, but—against the insured as shown by the deposit premium, and then later as against the charge there is a credit if payment is met?

A. At the final audit, yes.

Q. You send out these bills——

Mr. Murman: Which exhibit?

Mr. Eisner: Just a minute. I am looking at Exhibit 11 at the moment.

Mr. Murman: 13 is the final audit.

Q. (By Mr. Eisner): Possibly you can assist me. These bills on Plaintiff's Exhibit 11 are based upon the rate of .997 and .226, are they not?

A. Yes.

Q. They were sent out by Fidelity and Casualty Company to Bayly, Martin & Fay addressed to the California Motor Transport Company?

A. That is right. Those are voluntary reports, subject to audit.

(Testimony of C. A. Challburg.)

Q. You say you audited those books in April of 1947? Did you send out any bills addressed to the California Motor Transport Company before October, 1947? A. Yes.

Q. Where are they? [119]

A. They were produced a moment ago.

Q. This is Exhibit 13 to which you refer and the bills you are handing me purport to be copies, is that correct? A. That is right.

Q. When you made out these bills on April 19, 1947, did you send any copy to California Motor Transport Company?

A. No; all copies go to the broker.

Q. Mr. Challburg, after April 19, 1947, did you receive any payment from Bayly, Martin & Fay on account of the bills you rendered that date?

A. That I don't know.

Q. As auditor don't you know whether or not any payment would be made?

A. That is up to the cashier.

Q. Did you know if any further bill was sent out by Fidelity and Casualty Company of New York to Bayly, Martin & Fay, or anybody else, prior to October, 1947?

A. That I don't know. Copies might have been made; I don't know.

Q. You don't know? A. No.

Q. You are not familiar with any follow-up system in your sending out the bills? Whether they are paid is not in your department?

A. That is right. [120]

(Testimony of C. A. Challburg.)

Q. You don't know anything about that?

A. That is right.

Q. Were these bills made up in your department?
A. They were, yes.

Q. In making up these bills did you give them a different rate in figuring the premium than was included in your bills covered by Plaintiff's Exhibit 11?
A. Right.

Q. At whose request did you change the rate in figuring the bills between February 15, 1947, and April 19, 1947?

A. Those were given us by the underwriting department when we got the audit requisition.

Q. You don't have in your department, then, as I understand, any record of the premium rate of policies that are outstanding?
A. We do not.

Q. And you don't check when a remittance is received or a gross receipts statement received from an insured, you have nothing in your department by which you can check whether or not the insured has figured the premium according to the rate set forth in his policy by which he is to be covered?

A. We do not.

Q. That is all done by another department that does check that?
A. That is right, sir. [121]

Q. There is a department that does that job?

A. They are checked, as I say, in the final audit.

Q. Special final audit is made, we will say, months after the time these reports are received. Do you mean to say in the meantime there is no check made of them?

(Testimony of C. A. Challburg.)

A. Not until final audit is made.

Q. In the meantime the insured who has made his remittance remains in ignorance of that claim or whether or not——

Mr. Murman: If the Court please, how can this witness testify to the ignorance or intelligence of another?

Mr. Eisner: Well, I will withdraw the question. It speaks for itself. I think that is all. Excuse me; one more question.

Q. When you made an audit did you send a copy of it to the California Motors?

A. No, I do not.

Q. You just keep that in your file?

A. We send our copy to the broker.

Q. Did you send a copy of this audit to the broker? A. Yes. The files will——

Q. You refer to Bayly, Martin & Fay as agent?

A. As agent, yes, broker or agent.

Q. Are you familiar with whether or not collections were paid to Bayly, Martin & Fay by the California—by Fidelity and Casualty Company?

A. I don't know.

Mr. Murman: There is no question, Mr. Eisner, but what Bayly, Martin & Fay were your brokers, is there? You allege that in your pleadings.

Mr. Eisner: No, but they were our broker, and, as you allege, they were your agents for the purpose of collecting.

Mr. Murman: We don't allege any such thing.

Mr. Eisner: You allege that the reports and

(Testimony of C. A. Challburg.)

remittances were made monthly, and they could only have been made monthly if they were made to Bayly, Martin & Fay because they were made to Bayly, Martin & Fay.

Mr. Murman: There is no allegation of agency in our pleadings.

Mr. Eisner: I will ask you this:

Q. Mr. Challburg, is it the practice—do you know whether or not it is the practice of the Bayly, Martin & Fay to make collections of premiums upon policies which have been written through their office?

A. I do not know.

Mr. Murman: After all, he is just the auditor.

Mr. Eisner: I realize that, but I understand he has limited knowledge, apparently. No further questions.

Mr. St. Clair: May I ask a question or so, your Honor?

The Court: Yes. [123]

Q. (By Mr. St. Clair): Mr. Challburg, referring to Plaintiff's Exhibit 11—which are the reports made up by this witness, your Honor—do I understand you refer to those as bills?

A. Audit statements or audit bills, yes.

Q. Mr. Eisner was using the word "bills." Do you mean to have the Court believe from that statement that no money had been paid until that was received by Bayly, Martin & Fay?

A. That I don't know, what money was paid, when we get cash. It goes to the cashier.

Q. I don't want to butt my head against the

(Testimony of C. A. Challburg.)

same problem Mr. Eisner has been butting.

A. The payments are arranged with Mr. Davis. I know nothing of what has been paid.

Mr. Murman: Would it be of any help if I tell you we will produce the cashier? He will cover all that.

Q. (By Mr. St. Clair): I want to make it clear, when Mr. Eisner was cross-examining you with regard to whether or not Bayly, Martin & Fay paid Fidelity and Casualty Company, you were not inferring no money came into their hands after it issued those documents? A. No, indeed not.

Q. I understand that document was issued upon receipt of these reports? A. That is right.

The Court: All money had been paid on it already? [124]

A. That is right, your Honor.

Q. Who is that issued to?

A. It goes to Bayly, Martin & Fay, the broker.

Q. If there had been money paid on account wouldn't it be on that document?

A. The check wouldn't come into the audit department. It would come to the cashier.

Q. (By Mr. St. Clair): When Mr. Eisner showed you that letter of transmittal on the report of the company—you recall he showed you a series of those? A. Yes.

Q. You will recall that—I will hand them to you and ask you to read the language there.

A. "We enclose your report of gross receipts

(Testimony of C. A. Challburg.)

for September and October under the above-captioned policies'—

Q. In other words, that was when the check was drawn? A. No.

Q. It wouldn't show on this?

A. No, it wouldn't. I wouldn't know.

The Court: Let me see that letter. That is from your client?

Mr. St. Clair: Yes, sir. That is all I have of this witness.

Mr. Murman: I have only one question. [125]

Redirect Examination

By Mr. Murman:

Q. In connection with Plaintiff's Exhibit 12, I believe you stated that when Mr. Davis signed this there was only the figure at the top of the page?

A. That is possible, yes.

Q. Were these other pages attached to it?

A. No, he didn't sign that one. Those are just payrolls.

Q. That page wasn't attached to the preceding page when Mr. Davis signed it? A. No.

Q. He only signed as to the gross receipts?

A. That is right.

The Court: Let me see that.

Mr. Murman: Yes, your Honor.

The Court: Was this data on it?

A. Yes.

Q. SPL-20950? A. That is right.

(Testimony of C. A. Challburg.)

Q. Was that on it when Davis signed it?

A. That is right.

Q. Was this statement in here, "Assured refused to sign retrospective agreements"?

A. That I don't know. That could have been added later for our own information.

Q. But the policy number was on it at the time he signed? [126].

A. That is right, your Honor.

Mr. Murman: I have no further questions. Has anyone else any further questions of this witness? I understand that Mr. Challburg, by prior arrangement, has been scheduled to go to Detroit tonight. I have no further reason to call him. If he may be excused at this time, it will be appreciated. Do any of you want him retained?

Mr. Eisner: Not if you are going to produce the cashier.

Mr. Murman: We will produce the cashier tomorrow morning, unless the Court wants to proceed at this time. It is four o'clock. I don't mean tomorrow morning; I mean at the next calling of this case.

Mr. Eisner: I want to say this: I would appreciate it—I have a matter before the Federal Trade Commission scheduled for meeting on Monday at Los Angeles. I realize—I thought this case could be concluded in one day, but I see I was in error. I don't know whether it would meet with the convenience of Court and counsel if we could adjourn until Wednesday or Thursday of next week.

(Testimony of C. A. Challburg.)

(Colloquy between Court and counsel reported but not transcribed.)

The Court: We will continue then, until Wednesday. I don't see any need to put on another witness now. It is a quarter after four.

Mr. Murman: May Mr. Challburg be excused to go to [127] Detroit?

The Court: Yes.

Mr. Eisner: We stipulate to that.

Mr. St. Clair: So shall we.

(Thereupon the hearing of the instant cause was continued until Wednesday, October 5, and thereafter continued until Monday, October 10, 1949, at 10:00 a.m.) [127-A]

Monday, October 10, 1949, 10:00 A.M.

Mr. Murman: We had finished with the testimony of Mr. Challburg, the auditor, last Friday a week ago. Mr. Mettalia, the superintendent of the casualty department, had testified and then we called Mr. Challburg, the auditor.

The Court: Yes.

Mr. Murman: He had been interrogated and excused because he had to leave for the East. This morning I am proceeding with Mr. Rechnagel, the cashier.

CHARLES RECHNAGEL

called for the plaintiff; sworn.

The Clerk: State your name, please.

The Witness: Charles Rechnagel.

Direct Examination

By Mr. Murman:

Q. What is your business?

A. I am cashier for the Fidelity and Casualty Company.

Q. How long have you been so employed?

A. Thirty-two years.

Q. Have you been in San Francisco during that full period of time? A. No, sir.

Q. Are you familiar with the case on trial in so far as your department is concerned, Fidelity and Casualty Company v. [128] California Motor Express Company? A. Yes, sir.

Q. Mr. Rechnagel, I show you a group of six blue pieces of paper on which there is some writing, directed to California Motor Express, and ask you to identify what those are.

A. These are our ledger cards covering the various entries received in connection with this particular policy.

Q. That is the entries made in your department?

A. Yes, sir.

Q. These are the records of your department, then? A. That is right.

Q. I show you now four of the six cards which

(Testimony of Charles Rechnagel.)

you have identified—by the way, are these ledger cards? A. That is right.

Q. —and ask you to state what each is in order as I give them to you. The first one relates to SPL-20950 and SPL-20968, gives the assured as California Motor Transport Company, refers to audit of 2/15/47; location of risk, from 9/1/46 to 10/1/46, and ask you if that is a ledger card covering that period of time, from 9/1/46 to 10/1/46.

A. Yes, sir.

Q. In the upper right-hand corner there is listed a total of \$2,457.13. What is that?

A. That means that we were to bill the California, or charge California Motor Transport Company \$2,457.13 as an earned [129] premium from the time September 1, 1946, to October 1, 1946, on that particular policy.

Q. Does that card show when that was paid?

A. Yes.

Q. Where is that?

A. Right here (indicating).

Q. You point to a stamp "Paid March 15, 1947"?

A. That is right.

Q. That is the date that amount was paid?

A. That is the date it was posted in my records.

Q. Is that the date you took the amount into your records as a payment? A. That is right.

Q. It may have been received by the company before that, but it was posted on that date?

A. That is right.

The Court: How much is that?

(Testimony of Charles Rechnagel.)

A. \$2,457.13.

Q. (By Mr. Murman): That was from the period 9/1/46 to 10/1/46? A. Yes.

Q. I show you a similar card with similar notations from October 1, 1946, to November 1, 1946, showing a total of \$1,514.83, and ask you if that similarly reflects a posting of that amount of money for that period on your records? [130].

A. That is right, yes, sir.

Mr. St. Clair: What was that sum, Mr. Rechnagel?

The Witness: \$1,514.83.

Mr. St. Clair: Thank you, sir.

Q. (By Mr. Murman): That was—that also showed the same date of posting?

A. March 15, 1947.

Q. I show you a similar card covering the period 11/1/46 to 12/1/46, showing a total of \$2,040.62, and ask you if that shows the amount billed and the amount posted in your ledger.

A. It shows the amount that was posted in our ledger, posted again on March 15, 1947.

Q. That is borne out by the stamp on the record?

A. That is right.

Q. I show you a fourth card, similar in nature, bearing the period 12/1/46 to 1/1/47, showing \$2,036, and ask you if that shows a similar record.

A. Yes, sir, and that was posted on my records as of March 24, 1947.

Q. That is borne out by a similar stamp only it is a later date, is that correct?

(Testimony of Charles Rechnagel.)

A. That is correct.

Q. In addition to the four cards which I have shown you, Mr. Rechnagel, I show you a similar colored card referring to SPL-20968. The other cards which I have shown you have [131] referred to both policies, have they not? A. Yes, sir.

Q. SPL-20950 and 20968? A. Yes.

Q. This refers only to policy No. SPL-20968?

A. Yes.

Q. That covers on its face the period from 9/1/46 to 1/21/47, after which appear the letters "CANC." What does that mean?

A. Canceled out on our record November 7, 1947, and it was placed in the suspense account.

Q. I am referring not to that part, but above here, following the words "from 9/1/46 to 1/21/47, Canc."

A. That means that policy was canceled on that day, on January 21, 1947.

Q. In the upper right-hand corner there appears the figure \$5,950.52. A. That is right.

Q. There also appears on there—well, first, what does that figure represent?

A. That represents, in this case, the total earned premium for the time that this policy was in force.

Q. Is it gross or net?

A. That would be the remainder after giving the assured credit for whatever was present on that particular account.

Q. On the others, if I may ask, the figures on the

(Testimony of Charles Rechnagel.)

first four [132] cards were actually paid to Fidelity and Casualty? A. That is right.

Q. After giving credit for those amounts you reached a net due? A. That is correct.

Q. That is the amount you have just identified?

A. That is correct.

Q. That card shows—By the way, that net is as to that one policy only? A. Yes.

Q. This card shows stamped on it, "Billed July 28, 1947." What does that mean?

A. That means we billed our agent on that date, Bayly, Martin & Fay.

Q. Agent? A. Broker.

Q. Was Bayly, Martin & Fay your agent?

A. No, they are brokers.

Q. When you said "our agent," what did you mean by that?

A. We do have agents, our company.

Q. When you said your agent, you meant Bayly, Martin & Fay are brokers? A. That is right.

Q. Down below there is the word "Suspense" stamped. What does that mean? [133]

A. Because this item wasn't paid, we cancel it from an active account on November 7, 1947, and placed it in what we call our suspense account.

Q. That is an account to be collected?

A. Yes.

Q. When you said you took it from the active account on November 7, 1947, you referred to the date which is just above it, November 7, 1947, is that right? A. That is right.

(Testimony of Charles Rechnagel.)

Q. I show you a fifth similar card to which is attached a similar note, but yellow in appearance, and ask you what that is.

A. Here again is a final audit representing a balance due for the time of this particular policy, this particular report, from September 1, 1946, to January 21, 1947.

Q. When you say "this particular policy," what are you referring to? A. SPL-20950.

Q. That is the excess policy as to automobile and primary as to other risks? A. Yes.

Q. Is the reason for two cards because of the fact that this policy is excess as to automobiles, these blue cards? A. That is right.

Q. And the yellow card is primary risk as to other coverage, [134] is that right? A. Yes.

Q. That shows a similar stamp, "Billed July 28, 1947," is that correct? A. Yes.

Q. That is the date on which the billing was billed? A. Yes, sir.

Q. As in the case of the other card?

A. Yes.

Q. Only 20968 it refers to?

A. That is right.

Q. It also shows a stamp, "Suspense," and then the date, "November 7, 1947"?

A. That is right.

Q. So that it had become uncollectible and placed in the suspense account? A. Yes.

Q. The totals here which show on this card are \$1,508.16 as to the excess, is that correct?

(Testimony of Charles Rechnagel.)

A. Yes, sir.

Q. And on the other insurance which the excess policy covers, as a primary policy, there is the figure \$383.32?

A. That is right.

Q. Was the total premium that was placed in suspense as not collectible the total of those two figures? [135]

A. Yes, sir.

Q. I noticed down here at the bottom of this card something which doesn't appear on the others, the entry "3/31/47," showing \$1,082.54 paid. Can you explain that to the Court?

A. At the time that the—prior to the time that this item was placed in suspense we had in our agency balance account, or unapplied cash account, a payment of \$1,082.54, and because we didn't have an entry for that particular amount at that time we posted it to this card.

Q. You posted it on these cards?

A. That is right.

Q. Was that a payment on policy 20950?

A. No, on the other policy.

Q. So that was an error, then, putting it on that card?

A. It is an error. The actual balance here is the full amount.

Q. The actual balance is the full amount?

A. That is right, on that particular policy.

Q. \$1,508.16 and \$338.33?

A. That is right.

Q. Am I correct in asking, Mr. Rechnagel, where the blue registration card is for the \$1,082.54?

(Testimony of Charles Rechnagel.)

A. We never got any for that from our auditing department.

Q. So that you don't have a blue card similar to these first ones to cover it? [136]

A. That is right.

Q. This was posted to the wrong policy?

A. That is right.

Q. When this card, then, No. 5, the audit \$5,950.52, placed in suspension, policy 20968, the primary, does that net amount—did you take into consideration this payment of \$1,082.54?

A. Yes, sir.

Q. So that that is a total net due, then?

A. That is a total net due.

Mr. Murman: At this time I ask all these cards be placed in evidence as plaintiff's exhibit next in order, collectively as one exhibit.

(The ledger cards were marked Plaintiff's Exhibit 14 in evidence.)

Mr. Murman: I have no further questions. You may cross-examine.

Cross-Examination

By Mr. Eisner:

Q. Mr. Rechnagel, when a policy is issued by the Fidelity and Casualty Company are you given information in your department? A. Yes, sir.

Q. That the policy has been issued?

A. Yes, sir.

Q. What information are you given? [137]

A. We are given a copy of the policy, that is, what we call our daily report.

(Testimony of Charles Rechnagel.)

Q. That daily report is virtually a copy of the policy, is it not? A. Yes, sir.

Mr. Murman: Not virtually; it is actually, Mr. Eisner.

Mr. Eisner: Thank you. I accept the correction.

Q. It is then the business of your department, as cashier, to make the correct billings for it?

A. Yes, sir.

Q. If a policy calls for a payment as a deposit premium upon its execution, your department makes that collection, does it? A. Yes, sir.

Q. And in order to make that collection what does your department do? Do you bill the broker in the transaction?

A. We bill the broker in the transaction.

Q. Is the broker in the transaction, such as Bayly, Martin & Fay, then relied upon by the company to make the collection from the insured?

A. Yes, sir.

Q. Is the broker authorized by the company, your company, to make the collection in its behalf and then remit to the company?

A. The broker is authorized.

Q. The broker makes the collection on your behalf? [138] A. That is right.

Q. If the premium is not paid when it is due, you bill the broker, send the bill to the broker?

A. That is right.

Q. Now, then, Mr. Rechnagel, I call you attention to the fact that Policy No. 20950, Plaintiff's Exhibit 4 in this case, calls for a deposit premium of

(Testimony of Charles Rechnagel.)

\$6,685.40. A. Yes, sir.

Q. Did your department make collection of that deposit premium? A. No, sir.

Q. Did you send any bill to the broker for that deposit premium?

A. Yes—I can't say that we did, because we don't have any records of that.

Q. You have no record of having sent any bill to the broker for that deposit premium?

A. No, sir.

Q. Did you ever, according to your records, ever send any bill to the broker or to anybody else, the insured, for that deposit premium?

A. I can't say I did.

Q. Well, you know that you didn't, don't you, Mr. Rechnagel? A. No, it might have.

Q. According to your best recollection—— [139]

A. It should have been billed.

Q. What? A. It should have been billed.

Q. It should have been billed and wasn't billed?

Mr. Murman: That is not the witness' testimony. He said he had no recollection of it.

Mr. Eisner: All right.

Q. When you say it should have been billed, you mean according to the general practice of your company when a policy is issued which calls for a deposit premium, that it is the practice and the duty of your office to bill for that deposit premium?

A. That is right.

Q. I call your attention, Mr. Rechnagel, to

(Testimony of Charles Rechnagel.)

Policy No. 20968, Plaintiff's Exhibit 3, and I call your attention to the fact that this policy calls for a deposit premium of \$6,060, is that correct?

A. Yes, sir.

Q. Did you collect any deposit premium on that policy? A. No, sir.

Q. Is the same thing true respecting this policy and this deposit premium as respected the deposit premium called for on Policy No. SPL-20950?

A. Yes.

Q. Now, counsel has just introduced as Plaintiff's Exhibit 14 [140] a number of so-called registration cards. You know the registration cards, do you? A. Yes, sir.

Q. These are made up in your department?

A. Yes, sir.

Q. I am going to call your attention to the first of these registration cards. It bears date, as I read it, February 15, 1947? A. Yes, sir.

Q. Is that the date that registration card was made up? A. That is right.

Q. Is it a fact, then, that the first time a registration card was made up in your department for the policy 20950 and on policy 20968 was February 15, 1947? A. No.

Q. Do you have any earlier registration cards on this policy? A. Yes, the original entries.

Q. Just a moment, Mr. Rechnagel. I understand that it is your practice to make up registration cards on a policy when it is issued?

A. That is right.

(Testimony of Charles Rechnagel.)

Q. Did you make up any registration card on policy No. 20968 prior to the 15th day of February, 1947? A. Yes, sir.

Q. Where is it? [141]

A. It isn't here, but we have made one.

Q. Is it a blue registration card? A. Yes.

Q. What was that registration card?

A. The original premium.

Q. I will ask you to produce it for me if you have any registration card that was made up on this policy No. 20968 prior to February 15, 1947. Now, this registration card was made up on that date, is that correct? A. That is right.

Q. I notice that it recites here under this page, "Audit 2/15/47"—February 15, 1947, audit. What does that mean?

A. That means the date our auditing department gives a billing on this particular account—it is an audit bill prepared on February 15, 1947.

Q. In other words, you in your department receive an audit bill—— A. That is right.

Q. ——from the auditing department?

A. That is right.

Q. Was that in writing?

A. No, it is a typewritten bill.

Q. A typewritten bill. That is what I meant. Will you produce it for me?

Mr. Murman: It is already in evidence. [142]

The Court: It is in evidence already.

Mr. Eisner: Oh. Which is it?

(Testimony of Charles Rechnagel.)

Mr. Murman: I think it is Plaintiff's Exhibit 11 and 12.

Q. (By Mr. Eisner): That is the—did you—as I understand, the information from which you made up the registration card in your hand was Plaintiff's Exhibit 12?

Mr. Murman: No, that is not correct; it is 11. The audit bill is 11 and that is the final audit you have in your hand.

The Court: We will take a five-minute recess.

(Recess.)

Q. (By Mr. Eisner): Mr. Rechnagel, then it is my understanding that you as cashier made up the original card that is dated February 15, 1947, from this Exhibit 11, which purports to be a carbon copy of the statement to the California Motor Transport Company?

A. These cards were made up from these bills.

Q. To make that clear, the registration cards, Exhibit 14, were made up from the bills Exhibit 11?

A. That is right, yes, sir.

Q. Did you have in your department any other information from which to make up these registration cards Exhibit 14, other than Exhibit 11?

A. No, sir. [143]

Mr. Murman: May I point out, Mr. Eisner, that those bills that Mr. Rechnagel has identified relate only to the first four.

Mr. Eisner: Yes, that is correct.

Q. And the note stating it as having been made

(Testimony of Charles Rechnagel.)

up from Exhibit 11 refers to the first four of the registration cards? A. Yes.

Q. Which constitute a part of Exhibit 14?

A. That is right.

Q. You did have in your possession, however, the dailies of policy 20950 and 20968? A. Yes.

Q. When did you receive those dailies?

A. Those daily reports—do we have—I can't tell you unless I see the file.

Q. Do you have the file?

A. No, I don't.

Mr. Eisner: Does counsel have the file that the witness can refer to?

Mr. Murman: I have the dailies here, Mr. Eisner.

Mr. Eisner: I suggest if you give the witness his file he probably can answer these questions.

Mr. Murman: That is so. These are the dailies (handing documents to the witness).

The Witness: These are recorded by the accounting [144] department—policy No. SPL-20950 was recorded by the accounting department October 3, 1946, and policy SPL-20968 was recorded by the accounting department on October 8, 1946.

Q. Yes. Then on February 15, 1947, when you received these statements, Plaintiff's Exhibit 11—

A. Yes, sir.

Q. —you had had these dailies in your possession since the prior early October?

A. That is right.

Q. 1946? A. Yes, sir.

Q. When you received Plaintiff's Exhibit 11

(Testimony of Charles Rechnagel.)

did you observe that the rate at which the premium was calculated was .997 and .226?

A. No, because it isn't necessary.

Q. Why?

A. Because the auditing department, when they put through this bill, they are supposed to be correct.

Q. You made no reference then to the dailies that were in your possession? A. No, sir.

Q. Your department then simply accepted the statement of the auditing department as correct?

A. That is right, because if there is any mistake that would be picked up by the final audit, you see. [145]

Q. Now, then, Mr. Rechnagel, is it the practice of your department to make up ledger cards such as the first four ledger cards of Exhibit 14, as soon as the policies have been issued? A. Yes.

Q. I am referring next to the last two ledger cards in Exhibit 14. I call your attention to the fact that that ledger card, the fifth ledger card in this exhibit, is dated May 1, 1947? A. Yes.

Q. Was that the date that that ledger card was made out? A. Yes.

Q. Now, when that ledger card was made out on May 1, 1947, was that ledger card made out from Plaintiff's Exhibit 12? A. No, sir.

Q. What did you have in your possession on May 1, 1947, when you made out this registration card?

A. This bill.

Q. The bill you refer to, then, is a document that is annexed as a part of Exhibit 12, is that correct?

A. Yes, sir.

(Testimony of Charles Rechnagel.)

Q. And what is there indicated is a bill to California Motor Transport Company, purporting to be a carbon copy thereof, dated 4/19/47?

A. That is right. [146]

Q. Is that correct? A. Yes, sir.

Q. And you did not have in your possession, then, any other portion of Exhibit 12? I am showing you that exhibit so that you can check it.

Mr. Murman: You say "any other portion." You mean apart from the audit bill?

The Witness: Yes. There must be another audit for \$5,950.62. I believe they were entered at the same time.

Mr. Murman: I think that is No. 13.

Mr. Eisner: That is the only audit, counsel, that I know of that has been introduced in evidence. If there is any——

Mr. Murman: You will recall Mr. Challburg, identified it as an audit made by him, and that subsequent to these audits bills were sent out which constitute Plaintiff's Exhibit 13, and that was one of those that was attached to No. 12 that Mr. Rechnagel just identified.

Q. (By Mr. Eisner): To clarify this I will ask you, Mr. Rechnagel, just what did you have in your possession as cashier on May 1, 1947, when you made up this registration card?

A. I had an audit billing, and the date of that audit billing is dated April 19, 1947, and the amount due is on that particular—for that particular entry is \$5,950.52. Then we have, [147] on the same day,

(Testimony of Charles Rechnagel.)

another bill on policy SPL-20950, and that audit bill is dated April 19, 1947, and it is in the amount of \$1,508.16.

Q. That would be an audit bill similar to the audit bill which you have identified——

A. That is correct.

Q. ——as part of Plaintiff's Exhibit 12?

A. That is correct.

Mr. Murman: For the purpose of the record, Mr. Eisner, both audit bills are in evidence as Plaintiff's Exhibit 13. You have them right there.

Mr. Eisner: I think you are mistaken, counsel.

Mr. Murman: No.

Mr. Eisner: Just a minute. Well, maybe. They are annexed as part of that exhibit.

Mr. Murman: That is our exhibit. You will recall Bayly, Martin & Fay had a statement which was attached to it, but our exhibit was the audit bill.

Mr. Eisner: That may be correct.

Q. Attached to Plaintiff's Exhibit 13, I call your attention, Mr. Rechnagel, to carbon copies of statements dated April 19, 1947. A. Yes, sir.

Q. And the carbon copies of the statements directed to the California Motor Transport Company on the letterhead of [148] Fidelity and Casualty Company of New York are carbon copies of the statements that you received on May 1, 1947——

A. That is right.

Q. ——from which you say you made up that registration card? A. That is right.

Q. Very well. Now, then, when you made up

(Testimony of Charles Rechnagel.)

that registration card you made up a new charge of premium, didn't you? A. Yes.

Q. In other words, you then charged the premium on the registration card for the first time in your department at the rates specified in the dailies which you had received in October of 1946?

A. That is correct.

Q. And you never at any time prior to May 1, 1947, entered any charge in your department against California Motor Transport Company on these policies, No. 20968 and 20950, at any rate other than those shown upon, or for any premium other than that shown upon the first four sheets of the registration card on Plaintiff's Exhibit 14?

Mr. Murman: To which——

A. Except the original entry.

Mr. Murman: To which I object unless the question is directed purely to the amount, not rate, because this witness already testified he paid no attention to the rate.

The Court: I think he can answer the question. The [149] question is whether prior to that time he had ever made any entry, premiums figure, at any rate other than that rate.

Mr. Murman: That is agreeable, to the rate.

A. That is, we entered it October 8, 1946, at the original entry.

Q. (By Mr. Eisner): What is the entry on October 8, 1946?

A. \$6,060 on policy SPL-20968, and then on policy SPL-20950 we entered \$6,685.40.

(Testimony of Charles Rechnagel.)

Q. What dates did you make those entries?

A. On April 8, 1946.

Q. On April 8, 1946, you made the entries of the deposit premiums? A. That is right.

Q. Those were the deposit premiums, then, you entered upon your records? A. That is right.

Q. Did you make any other entry upon your record upon October 6, 1946—April 6—

A. May 1.

The Court: This was in April, not September?

Mr. Murman: I think there is a misstatement there.

Q. (By Mr. Eisner): When did you say you made the entry of this deposit premium?

A. October 8, 1946.

Q. On October 8, 1946, did you make any other entry on your [150] records, on these policies, other than the deposit premiums? A. No, sir.

Q. Then on this registration card which you say was made on May 1, 1947, I call your attention to the heading, "Billed July 28, 1947."

A. Yes, sir.

Q. What does that mean? What is the meaning of that?

A. That means we billed Bayly, Martin & Fay on July 28, 1947, for \$5,950.52.

Q. Was that the first time, Mr. Rechnagel, that Bayly, Martin & Fay or anybody else have been billed for premiums in addition to the premium shown upon the first four ledger cards of Plaintiff's Exhibit 14? A. Yes, sir.

(Testimony of Charles Rechnagel.)

Q. Now, with reference to the last registration card that is a part of Plaintiff's Exhibit 14, that is also dated May 1, 1947, and shown as billed on July 28, 1947, and what you have testified regarding the fifth registration card is also applicable to this registration card——

A. That is correct.

Q. ——without repeating it?

A. That is correct.

Q. Are the bills made out in your department?

A. Yes, sir.

Q. I show you Plaintiff's Exhibit 13 and call your attention [151] to the bills that are a part of that exhibit, in addition to the bills to the California Motor Transport Company upon the letterhead of Fidelity and Casualty Company of New York, and——withdraw that.

Do you have copies of the bills to Bayly, Martin & Fay of February, 1947?

A. No.

Q. They are billed by you, though?

A. Yes. We don't keep track of them.

Q. To whom are those bills sent?

A. They were sent to Bayly, Martin & Fay.

Q. Do you send any bill to the insured?

A. We do not.

Q. The only bill you send out is to the agent who does the collecting, is that it?

A. That is right.

Q. Did you receive any report from your department or Bayly, Martin & Fay after you sent out the bills of July 28, 1947?

A. The only statement we would have had—it

(Testimony of Charles Rechnagel.)

is now evident the item was put in suspense, so they must have reported before that to us they couldn't collect.

Q. Bayly, Martin & Fay reported back to you?

A. That is right.

Q. Did you send out any further bills to Bayly, Martin & Fay? [152] A. No, sir.

Q. After Bayly, Martin & Fay reported to you they couldn't collect, it was then, on November 7, 1947, the word "Suspense" was put on there?

A. Yes, sir.

Q. Is it your recollection Bayly, Martin & Fay reported they could not collect prior to November, 1947? A. That is right.

Q. Did you make any entry upon your records that Bayly, Martin & Fay reported they couldn't collect?

A. No, other than transferring this card to suspense. That would be on November 7, however.

Q. If Bayly, Martin & Fay, for example, reported to you in August of 1947 that they could not collect, did you make any entry upon your records at that time? A. No, sir.

Q. You simply disregarded it?

Mr. Murman: That is not the witness' testimony.

Q. (By Mr. Eisner): Well, did you send any further bills out?

A. No, we didn't send any further bills out.

Q. Have you any recollection as to in what month Bayly, Martin & Fay reported to you that the items were uncollectible?

(Testimony of Charles Rechnagel.)

A. It probably was in October.

Q. Of 1947? [153] A. That is right.

Q. Now, then——

A. Because of the fact that the item was transferred in November to suspense.

Q. I call your attention to the fact that upon Plaintiff's Exhibit 14, the first four registration cards, there is marked on the first three "Audit March 15, 1947." A. Yes.

Q. Was that payment made to your department?

A. No, sir, that was the date we posted it on our records.

Q. The check was received from Bayly, Martin & Fay—— A. Prior to that time.

Q. How long prior to that?

A. I can't tell here.

Q. Well, approximately.

Mr. Murman: That calls for a conclusion of the witness, Mr. Eisner.

Mr. Eisner: If he knows.

Mr. St. Clair: I object on the ground it isn't proper evidence; that is, it isn't a statement from this witness as to knowledge.

Mr. Eisner: I will ask counsel to produce anything you have by which they were remitted.

Mr. St. Clair: I have them.

Mr. Eisner: Let me have them, then. [154]

Mr. St. Clair: I am not sure they can be identified by this witness.

Mr. Murman: As I recall this witness' testimony,

(Testimony of Charles Rechnagel.)

he doesn't receive the money, he merely posted it on the registration cards.

Q. (By Mr. Eisner): Don't you receive the money? You are the cashier. Doesn't the cashier receive the money?

A. It comes into the accounts department.

Q. That is under your jurisdiction?

A. That is right.

Q. I call your attention, Mr. Rechnagel, to a check from Bayly, Martin & Fay to the Fidelity and Casualty Company dated January 28, 1947.

A. Yes, sir.

Q. Can you identify that check as one of the payments that were made and credited upon this registration card?

The Court: That is a check from Bayly, is it?

The Witness: Yes. Here is one of them, October 1, 1946, to November 1, 1946. The amount \$1,514.83 is right here.

Q. (By Mr. Eisner): In other words, the remittance that was credited, shown paid on March 15, was by check dated January 28?

A. That is right.

Q. 1947?

A. Then there is another item here. This amount. \$2,547.15, [155] is right here. That was for the audit September 1, 1946, to October 1, 1946.

Q. In other words, Bayly, Martin & Fay then remitted under the same check to you——

A. These two items.

Q. Well, so that we can identify them, the pre-

(Testimony of Charles Rechnagel.)

mium shown upon registration card first annexed as a part of Exhibit 14 covering the period from 9/1/46 to 10/1/46? A. That is correct.

Q. Also the amount of the premium shown upon the second registration card, a part of the same exhibit, showing the premium 10/1/46 to 11/1/46?

A. That is correct.

Mr. Murman: May I suggest they be marked for identification, that particular check, so that we will have a record of it?

Mr. Eisner: Very well, we will mark it for identification.

Mr. St. Clair: There is attached to that check, your Honor, some documents that are pertinent bookkeeping entries that I intend to put in through my own witness. May we have the whole three or four documents marked so that they won't be separated?

Mr. Murman: Yes, I intended that they be marked.

(The documents were marked Defendants' Exhibit D for [156] identification.)

Q. (By Mr. Eisner): I show you a check dated January 31, 1947, from Bayly, Martin & Fay, and ask you if that remits premium.

A. That is right, pays that premium \$2,040.62.

Q. 11/1/46 to 12/1/46, shown on the third registration card, part of that exhibit?

A. That is right.

(Testimony of Charles Rechnagel.)

Mr. Eisner: All right, we will have it marked for identification.

(The check was marked Defendants' Exhibit E for identification.)

Q. (By Mr. Eisner): I show you a check dated——

Mr. St. Clair: That is the check dated January 31, is that correct?

The Clerk: Yes.

A. This is the third check. This is a check, February 27, amount \$2,036 paid to the audit December 1, 1946 to January 1, 1947.

Q. (By Mr. Eisner): Being the fourth registration card, a part of Exhibit 14?

A. That is right.

Mr. Eisner: Let that be marked for identification, next in order.

(The check was marked Defendants' Exhibit F for identification.) [157]

Q. (By Mr. Eisner): And the next check——

Mr. St. Clair: Can we have the date of that?

The Witness: This check is March 28.

Mr. Eisner: 1947.

The Witness: This item, \$1,082.54, which is included in the check of March 28, should have been posted to 20968. However, we never got an audit in our department for that and when the item was——prior to the item being transferred to suspense it was posted to this card, \$1,082.54.

(Testimony of Charles Rechnagel.)

Q. (By Mr. Eisner): In other words, the check of \$961.61 dated March 28, 1947, covered the payment of premium from 9/1/46 to——

A. No, sir.

Q. ——from January 1, 1947, to January 19, 1947?

A. No, sir. You see, there is a report which was received by our office for \$1,082.54 covering the month's audit for which our auditing department never gave us the entry. Now, let's see; we can figure that out. This is for a period, I believe, from January 1 to December—to January 21.

Mr. St. Clair: 1947?

Q. (By Mr. Eisner): From January 1 to January 21, 1947?

A. Yes, I think that is right.

The Clerk: The fourth check is marked Defendants' Exhibit G for identification.

(The check was marked Defendants' Exhibit G for [158] identification.)

The Witness: That is the check of March 28, 1947.

Q. (By Mr. Eisner): You didn't send out any second bills in October of 1947, did you?

A. No, I don't—no, sir; not from the accounts department.

Q. Not from the accounts department?

A. No, sir.

Q. You are going to produce for me, if there are any, any ledger cards that were made out in

(Testimony of Charles Rechnagel.)

your department on policies 20950 and 20968 prior to February 15, 1947? A. Yes, sir.

Mr. Eisner: I think that is all.

Cross-Examination

By Mr. St. Clair:

Q. I have a few questions I would like to ask this witness, your Honor. One thing I would like to clarify for the record, I notice that both you and Mr. Challburg refer to these documents, some of these documents, I believe Exhibits 12 and 13 and 11—11 is the one—I show you Plaintiff's Exhibit 11. You refer to those as bills. Now, Mr. Challburg did the same. When you use the word "bill," you don't necessarily mean you send a bill for money that has never been received by your company, though? A. No.

Q. That is an interdepartmental use, isn't it?

A. That is right. [159]

Q. Actually, if I may judge from Plaintiff's Exhibit for identification D through G, the checks did appear from those defendants, the company had received the money before these bills were made out? A. That is right.

Q. So that it is the receipt of money that starts your intra-company mechanism?

A. That is right.

Q. So this thing you sent Bayly, Martin & Fay was actually a confirmation of receipt of payment, isn't it? A. That is correct.

Q. In your company practice when a notice of

(Testimony of Charles Rechnagel.)

cancellation was issued, did such a notice go to you, copy of it? A. Yes.

Q. I show you Plaintiff's Exhibits 5 and 6, which purport to be—or that is a notice of cancellation that was delivered sometime—what is the date?

A. December 19, 1946.

Q. On December 19, or somewhere near there, 1946, you and your department did know that the policies had been canceled?

A. That is correct.

Q. Again, in the company practice, these moneys you received from brokers, what is your practice with regard to the length of time that brokers customarily use for turning the money over to you that they have collected from the insured? Is [160] there an informal practice?

A. Well, sort of informal, yes. Usually about 90 days.

Q. It would be from 60 to 90 days before you received the money? A. Yes, sir.

Q. Strictly within your own company practice, then, the payment would not be in default until after a period of time had passed?

A. That is right.

Q. Then I ask you, so far as the deposit premium that was referred to is concerned, so far as your department is concerned, that wasn't yet in default, is that correct, that is, in December?

A. That is right.

Q. At the time you knew the policy was canceled,

(Testimony of Charles Rechnagel.)

then, and under your practice, that premium was not in default? A. That is right.

Q. Then certainly under your practice—withdraw that. If you can answer this—I suppose it is self-evident—a premium based on gross receipts for the month of September, 1946, obviously couldn't be computed until sometime in October, could it?

A. That is right.

Q. So that you don't expect payment from the broker until 60 or 90 days after sometime in October? [161] A. That is correct.

Q. So that these payments that you received on January 28, Defendants' Exhibits for identification D through G, were, so far as your department was concerned, timely payments, is that correct?

A. Correct.

Q. So far as the checks that went into evidence for identification only are concerned, attached to the checks are various pieces of paper, and annexed—I notice one of them is a standard Bureau form.

A. Yes.

Q. Do you know whether or not the defendant received a copy of that with the check?

A. We did.

Q. Where would that go to on interdepartmental procedure?

A. That would be in the accounts department and we would have the original of that.

Q. You would?

A. Yes, sir. It is quite evident that we had it on account of the payments.

(Testimony of Charles Rechnagel.)

Q. That is called standard Bureau Form 370?

A. That is right.

Q. Attached to this same check is a little more informal form, if I may call it that, that constituted an invoice, and it has a number. Do you know whether you received that [162] invoice attached to that check, or is that a record of Bayly, Martin & Fay?

A. I believe that must be the Bayly, Martin & Fay. We didn't get a copy of that. I doubt if we did.

Q. Can you from these documents marked for identification tell us whether or not you did receive this Form 370? Is there any way of refreshing your memory? You said——

A. It is quite evident we got—as a matter of fact, I think Mr. Murman has a copy of one of these now.

Q. As far as your best recollection is concerned, you testified you did receive the original of those forms? A. That is right.

Q. Again back to this matter of these bills, as you refer to them, I show you Plaintiff's Exhibit 11 and ask you to point out for the record and the Court, as a matter of fact those bills are made out to the insured, are they not? A. Yes, sir.

Q. They are not made out to Bayly, Martin & Fay? A. No.

Q. You meant, then, in your previous testimony that was not sent physically to Bayly, Martin & Fay? A. To be delivered to the office.

(Testimony of Charles Rechnagel.)

Q. But the bill, from your point of view, is to the assured? A. That is right.

The Court: I understood him to say those really aren't [163] bills, they are confirmation of payment.

Mr. St. Clair: I have fallen into the same bad habit, your Honor. They are not bills.

Mr. Murman: That is correct.

Mr. St. Clair: That is all the questions I have of this witness, your Honor.

Mr. Murman: I have just a few questions, your Honor.

Redirect Examination

By Mr. Murman:

Q. While we are talking about that confirmation of payments, Mr. Rechnagel, they are confirmation of payments of amounts submitted on voluntary audits, isn't that correct? A. That is correct.

Q. They are not confirmation of payments?

Mr. Eisner: Just a moment. I object to counsel leading his own witness.

Mr. Murman: All right. Withdraw that question.

Q. Do those confirmation payments have anything to do with the final audit? A. No, sir.

Q. Referring again to the same general subject, that is, Exhibits D through G for identification, the checks, those are the—are those the payments you received before you sent out these confirmations of payment? A. Yes, sir. [164]

(Testimony of Charles Rechnagel.)

Q. And again, they refer to voluntary audits?

A. That is right.

Q. Had nothing to do with the final audit?

A. No, sir.

Q. You said that there were no deposit premiums collected. I believe you said that in answer to one of Mr. Eisner's questions?

A. That is right.

Q. Also, in answer to Mr. St. Clair's question you said that cancellation notices had been sent out December 17, 1946?

A. I think that was the date, yes, sir.

Q. The deposit premiums were not in default on that date?

A. That is correct.

Q. Does that explain why they were not collected?

A. So far as my records are concerned, yes.

Q. Regardless of the deposit premium, these postings made on Plaintiff's Exhibit 14 as to the first four ledger cards refer to receipts actually received by the Fidelity and Casualty people from Bayly, Martin & Fay on account of the assured, is that correct?

A. That is right.

Q. And they were for the voluntary audits?

A. That is right.

Mr. Murman: I have no further questions.

Mr. Eisner: I have a couple of questions. [165]

Recross-Examination

By Mr. Eisner:

Q. Mr. Rechnagel, you have referred to final audits here. The final audit is nothing more than a check that is made of the records of the insured

(Testimony of Charles Rechnagel.)

by your auditing department to determine whether or not the insured has correctly reported his gross receipts; isn't that correct?

A. Yes, but also to determine that the correct rates were used and the classification of its payroll is correct.

Q. Just a moment. Mr. Rechnagel, do you mean to say that you wait until the final audit, which in this instance was in April of 1947, before a check is made to see whether or not the insured has reported his premium at the proper rate?

A. Yes.

Q. You mean to say if the regular premium was a dollar and the insured had reported his premium at a rate of 10 cents, that the first time your department would check the accuracy of the report and remittance of the assured was at the time of the final audit?

Mr. Murman: Objected to as argumentative and assuming something not in evidence.

The Court: I will allow the question.

A. My department wouldn't handle that in the first place. That is an auditing department matter.

Q. Is that the best answer you can give to that question, Mr. Rechnagel? [166]

A. That is correct.

Q. Now, Mr. Rechnagel, regarding the payments made to the brokers, or to your agent, I understand that you don't expect your agent to remit to the company for 60 or 90 days the money that the insured has paid to the broker on account of his premium?

(Testimony of Charles Rechnagel.)

Mr. St. Clair: I object to that question as calling for a legal conclusion of the witness. It assumes an agency that hasn't been proven and can't be proven by this witness.

The Court: Yes, it has that particular use of language.

Mr. Eisner: I will reframe the question, your Honor.

Q. Do I understand, then, that you do not expect the broker or the—who has placed the insurance, to remit to the company the premium that has been paid by the insured under 60 or 90 days after the broker has collected from the insured?

Mr. Murman: To which I object on the ground that what this witness expects is immaterial.

Mr. Eisner: It was part of your examination.

The Court: I will let him answer the question. He has already stated under questioning of Mr. St. Clair, without objection, that it was the practice to give 60 to 90 days' grace before those payments were made.

A. Well, we expect our agents to pay us their premiums when they collect them. However, they do not become overdue for 60 to 90 days. When I say "60 to 90 days," I mean this: The [167] September item actually has to be marked off my books on December 31, either by payment or cancellation.

Q. (By Mr. Eisner): You recognize the propriety of the payee, the party to whom the payment has been made, to retain the money for that length of time? A. Yes, sir.

Q. You have already testified regarding these

(Testimony of Charles Rechnagel.)

deposit premiums that it is the practice to bill the broker for these deposit premiums as soon as the policy is issued? A. Yes.

Q. Then do I understand that where a policy calls for a deposit premium, that the company does not mark that deposit premium as delinquent until 60 or 90 days after the policy has been issued?

A. Yes, sir.

Q. Now, notwithstanding that the broker is billed for it? A. That is right.

Q. Now, then, in this instance policy 20968, which is dated September 1, 1946, and called for a deposit premium, the deposit premium would be delinquent, according to your statement, on December 1, 1946?

A. It would become delinquent December 1, 1946, that is right.

Q. Because by that date you had not received remittance of the premium from the broker or agent, however you want to [168] designate him?

A. That is right. Yup!

Q. Then on December 1, 1946, did you make any demand upon Bayly, Martin & Fay for the payment of the deposit premium on policy 20946?

A. No, because——

Mr. St. Clair: Just a minute, Mr. Witness. My objection went to the prior question, but it assumes something not in evidence, that the policy was issued on December 1, 1946; the evidence showed the policy was issued in October, 1946, and this gentleman got it at that time. My objection runs to the line of questions that is based on an assumption of December 1, 1946.

(Testimony of Charles Rechnagel.)

Mr. Eisner: But the policy, if it ever became effective, the date it became effective was retro-active to September 1.

The Court: This witness already testified that the premium was in default on December 1, 1946. He might not be right about that, but anyway, he so testified, so the question whether he ever billed it at that time is immaterial.

Mr. Eisner: I think that is all.

The Court: It is twelve o'clock, gentlemen. This being law and motion day, we will take an adjournment until a quarter after two.

(Thereupon a recess was taken until 2:15 p.m. this date.) [169]

Afternoon Session, Monday, October 10, 1949

CHARLES RECHNAGEL

resumed.

Recross-Examination

(Continued)

Mr. Eisner: I have some further questions.

Q. Now, Mr. Rechnagel, at my request you have produced the other ledger cards that you had covering these policies? A. Yes.

Q. Are these the other ledger cards that you have? A. Yes, sir.

A. They were made out and entered on my records November 1, 1946.

Q. When were they made out?

(Testimony of Charles Rechnagel.)

Q. And those ledger cards contain only a reference to the deposit premiums, is that correct?

A. That is right.

Q. What is the deposit premium set forth on that registration card for policy 20950?

A. \$3,127.01.

The Court: What?

The Witness: \$3,127.01.

Q. (By Mr. Eisner): How do you reconcile that with the deposit premium of \$6,685.40 contained in the policy? A. I can't.

Q. You can't? [170] A. No, sir.

Q. Well, Mr. Rechnagel, where did the figure \$3,127.01 come from?

Mr. Murman: If the Court please, I object to any further questions along that line because we are not asking of the defendant from this Court for the deposit premium. We are asking for the earned premium, the difference between the premium paid on voluntary audit.

The Court: I understand, but on the other hand, the position of the defendant would be, or is, that the policies were never put into effect, and this is a circumstance that bears on it.

Mr. Eisner: Exactly. You stated just exactly what I have in mind.

Mr. Murman: Well, all right, your Honor. I just wanted to make our position clear, that we are not trying to collect the deposit.

The Court: I understand that.

Mr. Eisner: We know that. Well, what was the question? I think there was an objection.

(Testimony of Charles Rechnagel.)

(Question read.)

A. I said I couldn't explain that.

Q. (By Mr. Eisner): Now, what is the deposit premium shown upon your ledger card for policy 20968? A. \$6,060. [171]

Q. I notice that the deposit for the amount of \$6,060 has been evidently changed.

A. That is right.

Q. Do you know what was originally entered in that? A. Same thing.

Q. How do you know that?

A. Because it was a ditto operation. Probably the figures were not legible to the bookkeeper at that time and she went over it with ink.

Q. That is the only figure upon that policy that shows in ink, is it not? A. That is right.

Mr. Eisner: We offer these registration cards in evidence as Defendants' exhibit next in order.

Mr. Murman: To which we make the same objection, incompetent, irrelevant and immaterial, not within the issues of the case.

The Court: All right, overruled on the same grounds.

(The cards were marked Defendants' Exhibit H in evidence.)

The Court: \$6,060, is that the original deposit shown in the policy?

Mr. Eisner: Yes, \$6,060.

The Court: Policy 20950 is different. 20968 was changed?

Mr. Eisner: As shown in ink.

Q. Do you know when that inking was done?

(Testimony of Charles Rechnagel.)

A. At the time the bookkeeper—well, it was done probably when the clerk was balancing it with the transmittal sheets, or the bookkeeper caught it and changed it.

Q. Mr. Rechnagel, showing you registration card No. 5 in Plaintiff's Exhibit 14, you have already stated that that was made out on receipt of the report from the auditor dated April 19, 1947, is that correct?

A. Yes, sir.

Q. The card was made out on May 1?

A. May 1, 1947.

Q. It was billed July 28, 1947, is that correct?

Q. Yes, sir.

Q. What was the reason for the delay in billing this additional premium between May 1, when the registration card was made out, and July 28, 1947?

A. That would be the normal date of billing. In other words, we would bill for the first time on July 28 our May business.

Q. Now, Mr. Rechnagel, I call your attention to the fact that if the insured owed \$5,950.52 additional premium, that additional premium was owed from the time at least of cancellation of the policy, wasn't it?

A. That is right.

Q. Notwithstanding you made out the registration card on May 1, 1947, you say it is normal business practice for you to wait until July 28, 1947, before you would send out the [173] broker?

A. Yes. I might add upon that, that on April 19 formal billing of our audited bill went to the agent, the broker, Bayly, Martin & Fay.

Q. In other words, upon April 19, 1947, did you

(Testimony of Charles Rechnagel.)

send to Bayly, Martin & Fay a copy of the auditor's report that is annexed as a part of Plaintiff's Exhibit 13? A. Yes, sir.

Q. That went at that time to Bayly, Martin & Fay? A. Yes, sir.

Q. You are sure of that?

A. In duplicate.

Q. In duplicate? A. Yes.

Q. You are sure of that, are you?

A. Yes, sir.

Mr. Eisner: That is all.

Q. (By Mr. St. Clair): This may have been asked, your Honor, but I didn't get it. Mr. Witness, on Exhibit H there is the date November 1, 1946, is that correct? A. That is right.

Q. It was your testimony that was the date it was made up?

A. That is the date this cleared the accounting department records.

Q. It was made up sometime in October, then? [174] A. Yes.

Mr. St. Clair: That is all.

Mr. Eisner: One further question.

Q. What is the purpose of a deposit premium, Mr. Rechnagel?

A. You see, there are certain types of risks on which our company is unable to determine the actual premium. For instance, such a policy as this, and especially a more common one, compensation. Compensation policies or compensation insurance is based on a payroll basis. Of course, when we write

(Testimony of Charles Rechnagel.)

our policies, they go for a period of twelve months. We are unable to determine exactly what the premium on that particular policy is, so we write it on what we call an extended premium, and at the expiration of the contract the audit is made to determine what the actual premium is, and if the assured has paid us too much money at the beginning of the policy term, we give him a return premium.

Q. Isn't the purpose of the deposit premium in order that the company would be assured of payment by the insured and retain the deposit premium as security for its payment?

Mr. Murman: Objected to as argumentative. The witness already gave the explanation.

The Court: That is a conclusion of the witness, anyway. It is quite obvious.

Mr. Eisner: Yes.

Q. Mr. Rechnagel, this final audit that you have been [175] referring to, that is ordinarily made sometime after the term of the policy has expired?

A. Yes, sir.

Q. In other words, after the policy has run its term, then sometime after that the audit is made?

A. Yes, sir.

Q. And then, and only then, if the assured has overpaid by the deposit premium is a refund made to the assured?

A. Yes, sir.

Mr. Eisner: That is all.

(Testimony of Charles Rechnagel.)

Further Redirect Examination

By Mr. Murman:

Q. And if, after all, he has not paid a sufficiently large premium by the time the final audit is made, the assured is billed for the difference he is owing to the company, is that correct?

A. That is correct.

Q. And that is what was done here?

A. Yes.

Q. You said this morning, as I understand you, that the deposit premium became delinquent on December 1?

A. Yes, sir.

Q. By that did you mean there was a default on that date?

A. Oh, no, sir.

Q. What did you mean?

A. I meant that the premium became delinquent on December 1, and on December 31, that is, up to December 31 we would have [176] to either have our money or the policy would have to be canceled. I think I cited that as an example.

Q. So that in this case the premium, then, went on your books as a premium that was to be paid you on December 1, something that had to be paid between that date and December 31?

A. That is right.

Q. It would only be after December 31 you would attempt collection measures, is that correct?

A. That is right.

Q. In the meantime the notice of cancellation went out?

A. That is right.

Mr. Murman: I have no further questions.

(Testimony of Charles Rechnagel.)

Further Recross-Examination

By Mr. Eisner:

Q. One question: Mr. Rechnagel, you mean to say that if the policy calls for a deposit premium, that no effort is made to collect the deposit premium from the insured until after the policy is in effect for three or four months?

A. The company does not make any direct demands on the assured at all. We do it all through our agent and broker.

Q. Then I ask you this question: Do you mean to say that no effort is made to collect the deposit premium from the broker or through the broker——

A. Yes, surely.

Q. ——until after several months? In other words, the [177] practice is to have the broker collect the deposit premium immediately, isn't it?

A. That is right.

Q. When the policy goes into effect?

A. No. No.

Q. You are familiar with the fact that the California Motor Transport Company had this type of insurance from your company since the year 1941?

A. That is right.

Q. Each year each of those policies has called for a deposit premium?

A. That is right.

Q. Isn't it a fact that each year as soon as the policy became effective the practice was for the deposit premium to be collected from the California Motor Transport Company immediately?

Mr. Murman: By the broker?

(Testimony of Charles Rechnagel.)

Q. (By Mr. Eisner): The money to be received by the company?

A. It might be paid to the broker, but I couldn't say whether it was paid to the company. I mean, I have to have records of that. I couldn't tell you when it is paid, whether it is paid immediately or not.

Q. Don't you get any report from your broker as to whether or not a deposit premium of six or seven thousand dollars has been paid by the insured? [178]

Mr. St. Clair: To complete the record, keep it straight, I object to the question.

The Court: This is your broker——

Q. (By Mr. Eisner): I say, from the broker.

A. Only when the policy premium—there was defaultation of it. In this particular case there was. I didn't come into the picture at all because the policy was made up before it really became—there was a default on the premium.

Q. Why, then, would you say it was an oversight that the broker in this—Bayly, Martin & Fay—wasn't immediately billed for the deposit premium?

Mr. Murman: I didn't understand he testified to that.

Mr. Eisner: Oh, yes.

Mr. Murman: I object to that, stating something not in evidence.

Mr. Eisner: I am not stating something not in evidence.

Mr. St. Clair: I join in that. I believe the testi-

(Testimony of Charles Rechnagel.)

mony was that his best recollection was that a bill was sent.

The Court: I don't remember the use of the word "oversight."

Mr. Murman: No, he didn't use it.

Q. (By Mr. Eisner): What was your testimony regarding the fact that any bill wasn't sent for the deposit premium?

A. I said to the best of my recollection it must have been billed. [179]

Q. Have you been able to find any bills?

A. We don't keep those.

Q. Don't you keep copies of bills?

A. No.

Q. Have you any knowledge of any deposit premium having ever been billed?

A. It must have been billed. It must have been billed in December, but I wouldn't swear that it was. The item was delinquent in December and so a bill must have gone out to Bayly, Martin & Fay.

Q. Didn't you say this morning in your testimony that so far as you knew, to the best of your recollection, the deposit premium was never billed?

Mr. Murman: That is not what he said.

Mr. Eisner: Well, I will ask him if it isn't. I am cross-examining. A. No.

Q. You didn't say that? A. No.

Mr. Eisner: I will let the record speak for itself upon that.

Mr. Murman: Are you through, Mr. Eisner?

Mr. Eisner: That is all.

(Testimony of Charles Rechnagel.)

Further Redirect Examination

By Mr. Murman:

Q. One question on this default business: [180] Mr. Rechnagel, when the account goes into default, as you said this would have December 31, would you at that time have proceeded against the broker or against the assured?

Q. As a matter fact, that is what happened to this case when you took the case over to our office, isn't that right? A. That is right.

Mr. Eisner: Oh, just a moment.

Mr. Murman: That is all.

Mr. Eisner: That is all.

Mr. St. Clair: No questions.

(Witness excused.)

Mr. Murman: May Mr. Rechnagel be excused?

Mr. St. Clair: So far as I am concerned.

Mr. Eisner: I may have some further questions. I don't want to keep him here——

The Court: He can be called back.

Mr. Eisner: All right.

HENRY R. CANTLEN

called for the plaintiff; sworn.

The Clerk: Will you please state your name.

The Witness: Henry R. Cantlen. [181]

Direct Examination

By Mr. Murman:

Q. What is your business?

A. I am with Bayly, Martin & Fay as vice president in charge of their San Francisco office.

Q. How long have you been with Bayly, Martin & Fay? A. Since 1946.

Q. Do you in your capacity as vice president and in charge of the San Francisco office have contact with clients of Bayly, Martin & Fay?

A. Yes.

Q. Is Bayly, Martin & Fay the third party defendant in this case? A. Yes.

Q. Did the clients of Bayly, Martin & Fay in the year 1946 include the defendants in this case, the California Motor Transport people?

A. Yes.

Q. How long had they been clients?

A. Well, through an affiliation of ours, Spengler & Johnstone, they were clients of our office when Spengler & Johnstone affiliated with the office in October, 1940.

Q. Was that the first time your organization had contact with the defendants in this case?

A. As Bayly, Martin & Fay, yes.

Q. Did you yourself act as a representative of

(Testimony of Henry R. Cantlen.)

the defendants [182] in this case in connection with their insurance problem? A. Yes.

Q. In that connection you were the broker, is that right? A. Yes.

Q. In 1941 did you contact the plaintiff in this case in connection with automobile insurance for the defendants? A. In 1941?

Q. Yes. A. Yes.

Q. And successively for each year thereafter up until 1946, which concerns us in this case, did you contact the plaintiff in this case in connection with insurance for the defendants right along?

A. Yes, I did.

Q. Did you have any instructions from the defendants in connection with placing insurance?

A. Did I have any instructions? What do you mean?

Q. Did they tell you what they wanted or did they leave it up to you on where to place the insurance and the type, and so on?

A. No, it is always done after consultation with the client.

Q. With whom did you consult?

A. Mr. James Coughlin.

Q. Who is Mr. James Coughlin?

A. President of California Motor Transport Company. [183]

Q. There are a number of defendants mentioned here. Is he in control of those various defendants, so far as you know?

A. I wouldn't know whether he is in control.

(Testimony of Henry R. Cantlen.)

Q. When you consulted with him, did you have your consultation in connection with him representing these other defendants mentioned?

A. Yes.

Q. In addition to the California Motor Transport Company? A. Yes.

Q. By the way, you know Mr. Mettalia, do you not, who appeared as a witness here?

A. Yes.

Q. Was it with him that you consulted when you talked with representatives of the Fidelity and Casualty people about the insurance?

A. No. I talked with him at times and he was in our conferences.

The Court: What is his name?

Mr. Murman: Mettalia; the first witness, your Honor. I see Mr. St. Clair has the original, your Honor, of the letter that I just gave Mr. Eisner the copy of to look at. I think we might as well use the original as long as he has it.

Mr. St. Clair: I would like to say this: This letter and the associated letters with it were taken by myself personally from the Bayly, Martin & Fay file, purely to [184] facilitate. Otherwise I would have to tear the file down now. That is exactly the way it was in the file.

Mr. Murman: We have the originals and some carbons. We can use the originals right along.

Q. Mr. Cantlen, I show the original of a letter dated April 18, 1946, addressed to Bayly, Martin & Fay on the letterhead of the Fidelity and Casualty

(Testimony of Henry R. Cantlen.)

Company of New York, and signed by Mr. Anderson as resident manager, and ask you if you remember receiving that letter? A. Yes.

Q. Was that letter received by you in connection with your insurance dealings with the plaintiff on behalf of the defendants? A. Yes.

The Court: What is the date of that letter?

Mr. Murman: Dated April 18, 1946. At this time I offer it in evidence as plaintiff's exhibit next in order, and I would like at this time to read the letter, the last paragraph, which is the one that is particularly pertinent.

(The letter was marked Plaintiff's Exhibit 15 in evidence.)

The Court: That is a letter from the plaintiff to Bayly, Martin & Fay?

Mr. Murman: Bayly, Martin & Fay, yes, sir. Maybe I had better read the whole letter. Maybe that will make it clearer.

(Reading Plaintiff's Exhibit 15.) [185]

This is the part that was pertinent. I really read the first part merely to give you the picture, your Honor:

"The failure of the Los Angeles representative or representatives of the insured to cooperate with us claimwise is difficult to understand and, of course, it is costing us money, which will be reflected in the premiums which the in-

(Testimony of Henry R. Cantlen.)

sured will be obliged to pay. Permit me to suggest that you again call the situation to the attention of Mr. Cross, or whoever is in a position to cause the situation to be corrected, and emphasize the advisability of a change of attitude on the part of the insured's Los Angeles representative."

Q. Now, Mr. Cantlen, when you got that letter did you call that matter to the attention of Mr. Coughlin? A. Yes, I believe I did.

Q. In what way, or do you remember? In other words, did you do it by letter or verbally?

A. I think if I could refer to my file I could probably tell you exactly.

Mr. St. Clair: That is it you have there.

Mr. Murman: I am sorry; I didn't look through it (handing document to the witness).

A. Well, I called it to Mr. Anderson in my letter of the 22nd advising taking it up with the assured in San Francisco.

Q. I have here—pardon me. May I interrupt? I have the [186] letter of April 22.

A. Yes. Then I sent a copy of it. Here is my letter to Mr.—to the California Motor Transport Company.

Q. You sent a copy of the letter of April 18 to the California Motor Transport people?

A. According to this I did. It says so right there.

Q. Does that refresh your recollection that you did do that?

(Testimony of Henry R. Cantlen.)

A. Yes, I would say I did it if the letters contain that.

Q. I show you the original of the April 22 letter. I think you have already identified it as the original of one in reply to the April 18 letter, is that correct?

A. Yes, that is my signature.

Q. This copy of the letter of even date, you forwarded a copy of the April 18 letter to the California Motor Transport people, is that it?

A. That is right.

Mr. Murman: At this time I ask that these two letters be made a part of Plaintiff's Exhibit 15, since they all relate to the same incident.

The Clerk: I will staple them together.

The Court: What is the number? 15?

Mr. Murman: Yes, your Honor. I would like to read briefly from those letters, if the Court please. This is addressed to the Fidelity and Casualty Company of New York, Attention Mr. F. L. Anderson, dated April 22, 1946 (reading letter). [187]

Then the letter of even date to California Motor Transport Company, Attention Mr. J. C. Coughlin, President, dated April 22, 1946 (reading letter).

Q. You did receive a reply, did you not, Mr. Cantlen? A. I don't recall.

Q. I show you the original of letter dated, Fidelity and Casualty Company of New York, dated May 2, 1946, Attention Mr. Anderson, and signed by you, copy to Mr. Coughlin, and ask you if that refreshes your memory.

(Testimony of Henry R. Cantlen.)

A. Mr. Coughlin told me that personally, verbally.

Mr. Murman: I offer this in evidence as part of Plaintiff's Exhibit 15, since it refers to the same transaction.

The Court: What is the date of that letter?

Mr. Murman: May 2, 1946, your Honor. This letter reads, your Honor (reading letter).

The Court: Is all of that part of Exhibit 15?

Mr. Murman: Yes, your Honor. It all relates to the same matter.

Q. Now, Mr. Cantlen, you discussed this matter that is the subject of Plaintiff's Exhibit 15 with Mr. Coughlin orally as well as in writing, as you have just stated, is that correct?

A. To my best recollection, unless there is a letter in the file, I did gain that information, and in the absence of any letter I must have gotten it from him verbally. [188]

Q. I think you identified the last letter, May 2, as containing information that had been given to you verbally?

A. To my best recollection.

Q. At that time did your discussion relate to the increasing cost of insurance that the April 18 letter refers to that will be brought about by the conditions at Los Angeles if it wasn't corrected?

A. Well, that was a matter of constant discussion between us, because the matter of premium rates would be a matter of loss experience.

Q. Did you know that the loss experience of the

(Testimony of Henry R. Cantlen.)

Fidelity and Casualty people had increased percentage-wise particularly in connection with the policy that was in force at the time these letters were written? A. Yes.

Q. I call your attention to Defendants' Exhibit BB, which is put in evidence on your behalf, and which relates to the loss ratio increasing 185 per cent over—or of a loss ratio of 185 per cent, and ask you whether or not that was the subject of discussion between yourself and Mr. Coughlin at any time? A. Yes, we did discuss that.

Q. Did you tell Mr. Coughlin at any time before the policy which was then in existence had terminated that renewal of that policy would inevitably bring about an increase of premium rate? [189]

A. Yes.

Q. You did tell him that? A. Yes.

Q. Did you tell him or was there any discussion—

Mr. Eisner: Just a moment. If there are any conversations I would like a foundation laid, if the Court please.

Mr. Murman: All right.

Q. Can you state, Mr. Cantlen, when such a discussion took place as to point of time?

Mr. St. Clair: That is the discussion referred to in Exhibit BB?

Mr. Murman: Yes.

Q. The discussion between you and Mr. Coughlin in relation to the ratio loss increase, that is referred to in Third Party Defendants' Exhibit BB?

(Testimony of Henry R. Cantlen.)

A. We had numerous discussions.

Q. When you say "numerous," how many times, offhand?

A. Oh, we started discussing this thing and the renewal along in July, 1946.

Q. Is that the first time, according to your best recollection, that there was some discussion between you and Mr. Coughlin as to an increase in rate, possible increase in rate, put it that way?

A. It may have been, yes.

Q. Well, when you say it may have been, you mean that is [190] your best recollection?

A. I would say so, yes.

Q. From that time on there were numerous discussions, is that right?

Mr. Eisner: Just a moment. If there are any conversations——

Mr. Murman: I am just asking him if there were other discussions from that time on, and we will hammer that down as nearly as we can.

Q. Were there other discussions from July, 1946, on? A. Yes.

Q. What is your recollection as to the date of the next discussion?

A. Let's see. July. I would say around the first part of August.

Q. There is in evidence as one of your exhibits, Mr. Cantlen—or I should say Bayly, Martin & Fay's exhibits—Defendants' Exhibit CC, bearing date August 5, 1946. Would that refresh your recollec-

(Testimony of Henry R. Cantlen.)

tion as to about the time when the next discussion took place?

A. I would say it was shortly after this, but previous to this there was another discussion with Fidelity—after this letter, first there was another discussion took place with Fidelity and Casualty Company.

Q. After the letter of August 5, is that right?

A. That is right. He asked for certain information.

Q. In connection with the loss ratio, is that correct? A. Yes.

Q. Who did you talk to at that time with the Fidelity and Casualty?

A. Mr. O'Malley and Mr. Mettalia.

Q. After that you talked again with Mr. Coughlin, is that right? A. That is right.

Q. Can you approximate about when that was?

A. I would say it would have been possibly in the neighborhood of August 10th, somewhere in there.

Q. 1946? A. Yes.

Q. Was there anyone else present beside yourself and Mr. Coughlin?

A. No, I don't believe there was at that time.

Q. Did the discussion take place at Bayly, Martin & Fay's or California Motor Transport?

A. In Mr. Coughlin's office.

Q. In Mr. Coughlin's office in San Francisco, is that right? A. Yes.

(Testimony of Henry R. Cantlen.)

Q. In substance, can you tell us what was said at that particular conversation?

A. Well, I told Mr. Coughlin at that time that the Fidelity & [192] Casualty Company would only renew the policy on a retrospective basis, and at that time I explained to him the workings of a retrospective rating plan and that they were adamant, that they had instructions from the home office that in view of the general classification and the loss experience in that particular line that they were interested only in renewal on a retrospective rating plan.

Q. What was Mr. Coughlin's reply?

A. I explained—I had to explain the workings of the retrospective rating plan, and Mr. Coughlin wasn't—well, let's put it this way, he didn't like the idea or the workings of such a plan, so I told him I would go back and discuss it further with the company to see if we couldn't work out a guaranteed cost plan together. Well, at the same time, I explained to him we were attempting to interest other insurance companies to assume the business or take the business on on what we called a guaranteed cost plan, so I left Mr. Coughlin at that meeting, to my best recollection——

Q. This was in August, now?

A. That is right—that I would attempt further to have the Fidelity & Casualty Company consider the fee on a guaranteed cost basis, and also attempt to secure another market on a more attractive basis of a guaranteed cost basis.

Q. Did Mr. Coughlin, in that August 10th meet-

(Testimony of Henry R. Cantlen.)

ing, definitely tell you he would not consider insurance on the retrospective plan? [193]

A. No, he didn't tell me definitely, definitely tell me he didn't. He didn't like it that way.

Q. Did he tell you he wouldn't accept it that way?

A. There was no necessity for him to say.

Q. In other words, at that time you were not instructed not to place your insurance on any plan that involved a retrospective agreement, is that right? You had no instructions as to the retrospective agreement at that time?

Mr. Eisner: From whom are you speaking of?
From Mr. Coughlin? A. No.

Q. (By Mr. Murman): You went back to F. & C. and talked to them, someone, is that right?

A. That is right.

Q. About when did that conversation take place?

A. I would say the latter part of August, to my best recollection; around August 25th, or somewhere in that neighborhood.

Q. Was that with Mr. Mettalia?

A. Yes. Yes, I believe it was. I think O'Malley was in on the conference, too.

Q. At that time did you have any conversation as to the insurance with the retrospective plan?

A. With who?

Q. With Mr. Mettalia.

Mr. Eisner: I think the conversation would be the best [194] evidence.

(Testimony of Henry R. Cantlen.)

The Court: First, he has to find out whether he had one or not.

Mr. Murman: Yes.

Q. Did you have any conversation with Mr. Mettalia regarding the retrospective plan at that time? A. Yes.

Q. Can you tell us what you told him?

A. My best recollection was that they again repeated, and they both repeated, that the company was still adamant and the home office would not consider the business only on the basis of the retrospective plan.

Q. Well, it was drawing near to the expiration date of the policy then in force, was it not?

A. Yes, it was.

Q. The SPL-1497, I believe, was the number of it, was expiring September 1st, 1946, isn't that right? A. That is right.

Q. With it would expire the filings with the Railroad Commission and the ICC, isn't that correct?

A. Yes.

Q. And Mr. Coughlin's business was such that he needed those filings, isn't that correct? Will you answer "Yes" or "No," please? I didn't hear you.

The Court: He said "Yes." [195]

A. Yes.

Q. (By Mr. Murman): What did you tell Mr. Mettalia about the insurance when you stated that he said the home office was adamant, that there must be a retrospective plan?

A. I told him that the assured was adverse to

(Testimony of Henry R. Cantlen.)

that form of plan and that we were still trying to get together rather—this was the latter part of August I told him that the assured disliked the idea of a retrospective plan, in view of the possible penalty, and that we were still trying to get the thing worked out and have a meeting, or have them get together, and he gave me a binder pending renewal.

Q. That is Defendants' Exhibit B?

A. Yes.

Q. What, if anything, was said about the filings?

A. And that they would file so that there would be no lapse of coverage.

Q. You knew at that time, did you not, that in order to file with the ICC and the Railroad Commission there had to be a policy number filed?

A. That is right.

Q. And that the filing was—that they wouldn't accept a filing that related merely to a binder? You knew that?

A. That is right. Well, I am not sure of that. No. I can't answer that point, whether they will accept the filing of a binder or insist upon a policy number. Mr. Mettalia could [196] answer that.

Q. Well, we have in evidence Plaintiff's Exhibit 2—

A. You asked me if I knew that they would, that Interstate Commerce Commission would accept a filing of a binder. I don't know whether they will or not.

Q. No, I asked about the Railroad Commission and the ICC. A. I don't know.

(Testimony of Henry R. Cantlen.)

Q. You don't know as to the Railroad Commission, either? A. No.

Q. You are familiar with their form which provides for policy number? A. Yes.

Q. This is Defendants' Exhibit 2 which provides a copy of the file, actually filed. Now, did you report that to Mr. Coughlin, the conversation you had with Mr. Mettalia? A. Yes.

Q. What did he say?

Mr. Eisner: Fix the time, please, the foundation.

Mr. Murman: All right.

Q. Where did the conversation take place?

A. I delivered the binder to Mr. Coughlin.

Q. Was that before the expiration——

Mr. Eisner: Just a minute; let's get the date.

Mr. Murman: That is what I am going to ask.

Q. Is that before the expiration date of SPL-1547? [197]

A. I believe it was, to my recollection.

Q. So that would be before September 1st, 1946?

A. That is right.

Q. Where did you deliver the binder to him?

A. At his office.

Mr. Eisner: Did he say they delivered the binder or retrospective agreement?

Mr. Murman: The binder.

Q. Who else was there when you delivered the binder to him?

A. I don't recall anybody else being there.

Q. Was there any conversation about the binder

(Testimony of Henry R. Cantlen.)

and the insurance plan at that time? A. Yes.

Q. Can you tell us what was said?

A. I explained to Mr. Coughlin that the Fidelity & Casualty Company still were insisting upon the retrospective plan of insurance and that I was still unsuccessful in having them consider a guaranteed cost plan, and that we were continuing to attempt to secure or locate another market to offer to him, and continue our efforts with Fidelity & Casualty Company to have them reconsider the writing of it on a guaranteed cost plant, the rate to be agreed upon.

Q. Did you tell him about the company taking care of the filings that we have mentioned?

A. To my best recollection, I did. [198]

Q. You did? And what did he say as to that?

A. There was no particular comment. It was the customary procedure.

Q. By the way, had you been able to interest any other line in the risk up to that time?

A. No, I wasn't. Not at a—well, no, I wasn't.

Q. When were the policies received by you, Mr. Cantlen, referring to Plaintiff's Exhibits 3 and 4?

A. To my best recollection, it was the latter part of September.

Q. Had anything transpired between the time you delivered the binder to Mr. Coughlin and the time you received those policies?

A. Yes. What was that question again?

Q. I said, had anything transpired in between that time? A. Between what?

(Testimony of Henry R. Cantlen.)

Q. Between the time you delivered the binder to Mr. Coughlin and the time you received the policies, Plaintiff's Exhibits 3 and 4, in connection with this matter of insurance?

A. Had what transpired?

Q. Anything. Was anything done in between that time?

A. I was talking with other markets, and finally Mr. Metallia got hold of me and informed me that the policies would have to be written.

Q. Why? Did he give you any reason why they would have to be written? [199]

A. Yes, because the company was insisting upon the business being declared, and that if that—and that the retrospective agreement would have to be drawn and signed and the policies would have to be written.

Q. Did you communicate that to Mr. Coughlin?

A. I did right after the writing of the policies and the receiving by us of the retrospective agreement.

Q. And when was that?

A. Well, my best recollection would be we received these—it was the latter part of September or first part of October, and it would be immediately after that.

Q. At that time did you show the policies to him?

A. No.

Q. Well, where did the conversation take place, if there was a conversation?

A. With Mr. Coughlin?

(Testimony of Henry R. Cantlen.)

Q. Yes. A. In his office.

Q. What did you say to him and what did he say to you?

A. I explained to him that the Fidelity & Casualty insisted upon the declaration of the policies and the drawing of the retrospective agreement.

Q. When you say the declaration of the policies, what do you mean by that? I mean, that is a little unusual phrase.

Q. Well, in the business, you might carry the business under a [200] binder, and the declaration of the policy is declared on writing of the actual contracts.

Q. The writing of the actual contract is in the paragraph here where binders is referred to, is that correct, in reference to the policies being issued, they would supersede the binders?

A. That is right.

Q. So you told him the company was insisting on your declaration of the policies, as you put it, is that correct—the signing of the retrospective agreement and the declaration of the policies?

A. Correct.

Q. What happened after that?

A. I again went over the workings of the retrospective plan and left the retrospective agreements with him, and he said he wanted to look them over and would probably have his attorney look them over, but he again reiterated that he would not be wholly satisfied with such a plan, and asked me if I couldn't interest a market, so I told him

(Testimony of Henry R. Cantlen.)

we were scouring the market to obtain a company that would write the business on a guaranteed plan in lieu of a retrospective writing plan.

Q. Up to that time, you had not been successful, is that right? A. No.

Q. When you say "No," you mean you hadn't been successful? A. That is right.

Q. This was in October, was it, or the latter part of September? [201]

A. No, this would have been in October.

Q. Prior to that time, Mr. Cantlen, were you aware of the fact that claims had been sent in to F. & C.?

Mr. Eisner: Pardon me; did I understand the latter part of October, Mr. Murman, the date?

Mr. Murman: No, early part of October.

Q. Were you aware of the fact that claims had been sent in to F. & C. by the defendants in this case, reporting accidents that had involved their vehicles?

A. I wouldn't necessarily have been aware of it because, under the system we had of reporting, the assured in this case reported direct to the insurance company.

Q. Well, I show you here a claim which shows the date of accident as September 1st, 1946, being a part of Plaintiff's Exhibit 9, in evidence, signed by Mr. J. H. Cross, Superintendent, California Motor Transport Company—do you know Mr. Cross, by the way? A. Yes.

(Testimony of Henry R. Cantlen.)

Q. He is Superintendent, or was at that time?

A. Yes.

Q. —on which the Fidelity & Casualty Company paid a settlement figure or claim of \$59.74 under Policy SPL-20968, and ask you whether or not that was sent in directly to the Fidelity & Casualty Company or through your office?

Mr. Eisner: Just a moment. What do you mean? You have [202] asked a conglomeration of questions. You have asked whether the Fidelity paid that policy under—paid that loss under a certain policy.

Mr. Murman: No, I am asking him to identify it, and asked him whether it was sent through his office or directly by the defendant.

Mr. Eisner: You mean the claim itself?

Mr. Murman: That is correct.

A. To my best recollection, this went direct to the insurance company, and did not go through our office.

Q. Well, Mr. Cantlen, according to your best recollection, was the general practice that of going direct and not through your office? A. Yes.

Q. So the exception would be for it to go through your office? A. Yes.

Q. Then, I will show you Plaintiff's Exhibit 9, which has been identified as claims reported to the F. & C. through the San Francisco office of the F. & C., and ask you to look through there and tell us which, if any, of those claims were reported through your office.

The Court: While he is doing that, we will take a

(Testimony of Henry R. Cantlen.)

short recess.

(Thereupon, a short recess was taken.)

Q. (By Mr. Murman): You have finished, have had a chance to [203] look through Plaintiff's Exhibit 9?

A. Yes.

Q. Have you found any, Mr. Cantlen?

A. Just one here where we had one.

Q. Just one out of the group is all you were able to find, is that correct?

A. Yes.

Q. What is the date of that accident, as shown by the file?

A. The date of the accident?

Q. Yes.

A. October 25, 1946.

Q. Do you recall the circumstances of that matter being reported through your office, Mr. Cantlen?

A. Well, the reason that we had some knowledge of it was that I see a copy of a memorandum our office sent, sending a report to the Fidelity & Casualty Company.

Q. Is that a claim on a property damage and/or personal damage or a bond, or do you know?

A. This fellow had a thumb lacerated.

Q. Oh, yes. So it was a combination claim, a "P.D.," as well as "P.L.," as the saying goes?

A. Yes.

Q. This came to you, then, from the defendant in this case, the assured?

A. What came? [204]

Q. This file.

A. No.

Q. This claim.

A. We didn't have the claim. The claim was reported to the insurance company direct.

Q. Direct?

A. Correct.

(Testimony of Henry R. Cantlen.)

Q. I thought you said it had gone through your office?

A. I said we had knowledge of it because the complaint was served on the assured, which in turn forwarded it to us, to our office, and transmitted it to the insurance company.

Q. It was transmitted by you to the insurance company under Policy No. SPL-9068 and SPL-20950, is that correct?

A. That is correct.

Q. Those are the policies in question in this case?

A. That is right.

Mr. Murman: If the Court please, I wonder if we could take from Plaintiff's Exhibit 9 this one file, identified by the witness, and separately mark it in some way so that we don't lose track of it, otherwise it is liable to get back in this pile of claims and we will lose it.

The Court: I have no objection to your marking it as exhibit next in order, which would be 16, I think.

The Clerk: Plaintiff's Exhibit 16 in evidence.

(The document was marked "Plaintiff's Exhibit 16," in evidence.) [205]

Mr. Murman: Let the record show that is taken from Plaintiff's Exhibit 9 and identified by the witness as one that his office had knowledge of.

Q. Isn't that correct, Mr. Cantlen?

A. Yes.

Q. Now, Mr. Cantlen, as to these voluntary audits which are Plaintiff's Exhibit 10, starting with the one on September, 1946, and going along

(Testimony of Henry R. Cantlen.)

for successive months, were those prepared in your office? A. Yes, they were.

Q. What information did you receive in connection with the previous audit?

A. We received vouchers, checks, and vouchers, from the assured, which contained these reports, gross receipts reports, and we would process them in our office, make up the statements and forward them on to the insurance company.

Q. Having in mind this first gross receipt report, dated September, 1946, have you any knowledge as to when you received the information as to the gross receipts on which the report is based from the insurance company—from the defendants, pardon me?

A. I couldn't tell from here, but if I could have my file I think I could probably tell. You want to know when——

Q. (Handing document to the witness): When you received the information upon which the gross receipts report of September, [206] 1946, is based.

A. Well, it was previous to January 27th because that is the date we sent them to the insurance company.

Q. But can you tell us approximately when, prior to that time, it was received by you?

A. I couldn't tell you the exact date.

Q. Is there any way to approximate it? In other words, would it have been in October, November, December? A. For September and October?

Q. For September?

(Testimony of Henry R. Cantlen.)

A. September? No, sir, it wouldn't come to us until, I would say, the latter part of October.

Q. Latter part of October?

A. That would be maybe the first part of November.

Q. Is it a fair statement, then, Mr. Cantlen, to say that the information for one particular month arrived in your office about thirty days late, or thirty days after that month? A. Yes.

Q. That was the general procedure, is that correct? A. That is right.

Q. That would apply, then, to each one of these reports, September, October, November, December, and January 1st to January 17th, 1947, is that correct? A. Yes, I would say so.

Q. Can you tell the court whether you asked for this information [207] from the assured, or did it come to you as a routine procedure?

A. Routine procedure.

Q. How much of the information came to you, referring, as an example, to September, 1946, and the information appearing in the column under "Revenue," come to you from the assured?

A. Well, here it is right here on the typed voucher, shows you how it would be reported. It is under "P.L." and "P.D." insurance and revenue and rate.

Q. In other words, that report not only shows in the revenue column, but also a figure showing under the primary public liability rate and under property damage?

(Testimony of Henry R. Cantlen.)

A. No, they show a combined rate.

Q. Did you break it down, then? A. Yes.

Q. What you would get from them, then, was the revenue and the two rates combined into one?

A. Here it is right here (indicating).

Q. When you say "here," are you referring to your file?

A. This was a copy. This is the voucher, the vouchered portion of the check.

Q. Was that information accompanied by a check from the assured to you, then? A. Yes.

Q. Payable to you? [208] A. Yes.

Q. I see. And this was an explanation, then, as to the amount of the check, is that right?

A. That is right.

Mr. Eisner: It was part of the check, attached to it.

Q. (By Mr. Murman): Attached to it and explaining the check itself?

A. It says, "Please detach this statement for deposit."

Q. You took that information furnished by the assured, put it on the form we have in evidence, and sent it to the company? A. That is right.

Q. So all you did with the accident was its transmittal?

Mr. Eisner: Just a moment; that is calling for a conclusion of the witness.

The Court: I believe so.

Q. (By Mr. Murman): Well, did you do anything in furnishing this information to the company,

(Testimony of Henry R. Cantlen.)

to the insurance company, other than taking the information from the voucher furnished you by the insured, and putting it on this form?

A. Well, we had to combine it here. We have it for various companies, Sunset Transfer, Coastwise Express, various haulers, Red Line Transfer Company. We combine it on this form, broke it down into the subsidiary companies on individual company revenue, rates, develop the premium, and send it to the company.

Q. So that the check sent to the insurance was no different [209] from what you received, except you had changed the form of it?

A. What is that again?

Mr. Murman: May I have the question read?

The Court: I think it is pretty clear to see what he did. He had this combined statement submitted, covering various companies, various insurance policies, and various rates, and he breaks it down to the particular fidelity and deposit company and sends his breakdown with his check for that particular amount.

Mr. Murman: Yes.

The Court: And his statement.

Mr. Murman: Yes, that is correct.

Q. That was done on each one of the months shown on these gross receipts reports?

A. Yes.

Q. Now, Mr. Cantlen, after you received the policies from the Fidelity & Casualty people, did you show them to Mr. Coughlin?

A. No.

(Testimony of Henry R. Cantlen.)

Q. At the time you had this discussion with him early in October, as you stated, concerning the company wanting the policies to be declared, you had them in your possession then?

A. They were in my office.

Q. You didn't take them over to Mr. Coughlin, though? A. No.

Q. Did you tell him you had them in your office? [210] A. I believe so.

Q. What you did take over to him, as I recall your testimony, was the retrospective agreement, which is Defendants' Exhibit C, is that correct?

A. That is correct.

Q. Did you point out to him at that time that the retrospective agreement referred to a definite policy, No. SPL-20968?

A. I don't recall that I was that specific.

Q. But you did leave it with him? A. Yes.

Q. Now, Mr. Cantlen, did you receive a cancellation notice that the company sent out in connection with these policies?

A. We received a copy of it.

Q. You received a copy? Did you deliver the copy to the assured or discuss the copy with the assured at all?

A. Yes, after they were served, we discussed it, and there was thirty days for it to become effective.

Q. Did you also receive notice of cancellation of filing with the Railroad Commission?

A. No, not to my knowledge.

(Testimony of Henry R. Cantlen.)

Q. Do you know—did you have any discussion with Mr. Coughlin about the cancellation with the Railroad Commission?

A. I don't think any particular conversation.

Q. You don't recall any at this time?

A. No. [211]

Q. Do you recall having received copies of Plaintiff's Exhibit 13, which refers to the statement of adjusted premium, or contains the statement of adjusted premium to the California Motor Transport Company, naming Bayly, Martin & Fay the broker, dated April 19, 1947, and referring, first, to SPL-20950, and, secondly, SPL-20968?

A. Yes, we received those.

Q. What did you do when you received those copies, other than perhaps filing them in your records?

A. When I received them, I immediately got in touch with the company—

Q. Which company, now?

A. Fidelity & Casualty Company—and questioned the rate that was charged for the primary automobile coverage in these audits.

Q. Was there some difference between that rate and the rate in the policies?

A. No, it was the same rate.

Q. Did you send out any bills to the defendants?

A. No. I did in August, August 6th these bills were made up.

Q. August 6th of what year? A. 1947.

Q. Were those bills then sent to the company at that time, August 6th?

(Testimony of Henry R. Cantlen.)

A. Sent to California. [212]

Q. I mean to the California Motor Transport Company.

A. No, they were not delivered to them until, I believe it was—can I again look at my file?

Mr. Murman: I believe that will be all.

Mr. Eisner: Let the witness answer the question you asked, first. He said he wanted to look at his file.

Q. (By Mr. Murman): I thought this might refresh your recollection. I have a copy of a letter dated August 7, 1947, addressed to the California Motor Transport Company, Ltd., apparently signed by you, Mr. Cantlen, copy sent to the Fidelity.

Mr. Eisner: Why not let the witness examine his file and answer the question?

Q. (By Mr. Murman): And I ask you if that refreshes your recollection?

A. Yes; this was written in August, but it wasn't delivered to the assured until some time in October.

Mr. Murman: Have you seen this, Mr. Eisner?

Mr. Eisner: Yes, I have.

Mr. Murman: All right, I will offer this in evidence as Plaintiff's exhibit next in order, if the Court please. It is dated August 7, 1947, but the witness stated it was not delivered until October.

(The document was marked "Plaintiff's Exhibit 17," in evidence.)

Mr. Eisner: Suppose we give you the original of that, [213] counsel, so you can introduce the original of that letter.

(Testimony of Henry R. Cantlen.)

Mr. Murman: Well, that is all right. If you have it handy, I would be glad to, and we will withdraw the copy. Do you have a reply to it?

Mr. Eisner: I would like to read it at this time.

Mr. Murman: I will read it. It is our exhibit.

Mr. Eisner: All right.

Mr. Murman: At this time, with the Court's permission, I will read the letter. (Reading Plaintiff's Exhibit 17.)

Q. That letter, I take it, then, Mr. Cantlen, was a covering letter not only of the invoices but the policies, as well? A. Yes.

The Court: What is the date of that letter?

Mr. Murman: August 7, 1947, but I believe the witness stated, Your Honor, it wasn't delivered until October.

Q. Is that what you said? A. Yes.

Q. Did you receive a reply from the California Motor Transport people to that letter?

A. Yes.

Q. Do you have it there? A. Yes.

Q. May I have it, please?

Mr. St. Clair: Somebody served a demand on us for that letter, although I have forgotten who.

Mr. Murman: I believe it was Mr. Eisner.

Mr. Eisner: Yes, I did.

Q. (By Mr. Murman): You have showed me a letter, Mr. Cantlen, under letterhead of the California Motor Transport Company, Ltd., dated October 22nd, 1947, addressed to Bayly, Martin & Fay, attention yourself, and signed by Mr. W.

(Testimony of Henry R. Cantlen.)

J. Davis, Assistant Secretary, per somebody. Is that letter in reference to when you said you received a reply? A. Yes.

Mr. Murman: At this time, if Your Honor please, we will offer the letter in evidence as plaintiff's exhibit next in order.

(The document was marked "Plaintiff's Exhibit 18," in evidence.)

Mr. Murman: At this time, I ask leave to read the letter identified by the witness, now Plaintiff's Exhibit 18. (Reading Plaintiff's Exhibit 18.)

Q. Now, Mr. Cantlen, did you acknowledge that letter from the California Motor Express people—Motor Transportation Company? I have here what purports to be a copy of the original, and ask you if that is such a copy?

Mr. Murman: Do you have the original, Mr. Eisner? A. Yes.

Mr. Eisner: No.

Mr. Murman: Then, you would like to look at that, I suppose? [215]

Mr. Eisner: Yes, I would. We have no recollection of ever having received any copy. If the witness can testify, to his knowledge, it was mailed or sent. I notice there is at the bottom of it a line "Copy." I don't know what that is.

Mr. Murman: That is to us.

A. Here is my copy, Mr. Eisner; my copy of the letter, together with a letter I received from—the insurance company wrote me certain facts, and I transmitted them to the assured.

(Testimony of Henry R. Cantlen.)

Q. (By Mr. Murman): You quoted from our letter?

Mr. Eisner: We have no recollection or record of having received that letter. If you can testify it was sent, to your knowledge——

A. To my best knowledge.

Mr. Eisner: But we have no record of it and I have never seen it before. I don't know whether it was mailed or not.

Q. (By Mr. Murman): So far as you can recollect, Mr. Cantlen, was this letter, of which the exhibit is a copy, mailed to the California Motor Transport Company, and was it about the date of the letter?

A. To my best recollection.

Mr. Murman: At this time, we will offer it in evidence as plaintiff's exhibit next in order.

(Document was marked "Plaintiff's Exhibit 19," in evidence.)

Mr. Murman: At this time, with the permission of the [216] Court, I will read it to the Court. (Reading Plaintiff's Exhibit 19.)

The Court: Who is that addressed to?

Mr. Murman: That is addressed to the defendants, Your Honor, November 12th, 1947.

A. He should have it.

Mr. Murman: It carries in the lower left-hand corner: "Blind copy, Fidelity & Casualty Company of New York, attention Mr. Metallia."

I have no further questions.

Mr. Eisner: I am going to have rather an extended examination of this witness, if the Court please.

The Court: Well, if that be the fact, I have to leave here early today; in five minutes, as a matter of fact. That case that was going on tomorrow, that criminal case, I am informed the jury has been waived, so I have asked them to wait until this is finished and then go on. The Clerk says we have assured that criminal case—they have witnesses from New York—that they will go on definitely on Wednesday, and if you can't finish this by tomorrow we will have to go over to some unforeseen time.

Mr. Murman: This is my last witness.

Mr. Eisner: I shall only have Mr. Cantlen and two other witnesses. I think we should be able to finish tomorrow.

The Court: How about you, Mr. St. Clair? [217]

Mr. St. Clair: Obviously, they are stealing my thunder by putting Mr. Cantlen on. I suspect by the time they get through I will have just piecing together.

The Court: In view of the fact that this has been broken into, I would like to have some arguments made.

Mr. Eisner: We will be glad to do that. We can close the testimony tomorrow, and the Court could fix a time that will be convenient, or if we have time tomorrow, if satisfactory.

The Court: We will try to work out a time.

Mr. Murman: It might be helpful to the court if we filed short written memorandums on the matter. Whatever the Court wishes.

The Court: It doesn't make any difference to me. Maybe we can start at a quarter to ten tomorrow.

Mr. Eisner: Very well.

(Thereupon, this cause was adjourned to 9:45 o'clock a.m.) [218]

October 11, 1949—9:45 o'Clock A.M.—Tuesday

HENRY R. CANTLEN

a witness called on behalf of the plaintiff, being previously sworn, resumed the stand and testified further as follows:

Cross-Examination

By Mr. Eisner:

Q. Mr. Cantlen, you had a discussion pertaining to Policy No. 1457, which would expire September 1st, 1946, with Mr. Coughlin some time in July, 1946?

A. Yes, as I recall, we had a discussion. It indicated that the experience was unfavorable—a preliminary discussion.

Q. Do you recall Mr. Davis being present at a conversation in Mr. Coughlin's office, whereat you and Mr. Coughlin were present, in July or August of 1946, in which the matter of the renewal of Policy 1457 was discussed?

(Testimony of Henry R. Cantlen.)

A. It seems to me that Mr. Davis was at the meeting that took place the latter part of August.

Q. Mr. Cantlen, do you recall that at that conversation, the latter part of August, that Mr. Coughlin told you that he would not be willing to renew the policy at any higher rate of premium than contained in Policy No. 1457.

A. No, I do not.

Q. Do you remember that Mr. Coughlin told you at that conversation that if there was any increase in premium he would place the insurance with the Transport Insurance Exchange, [219] in which he was interested?

A. No, he did not.

Q. Did you know he was interested in the Transport Insurance Exchange?

A. Yes, we had some conversations concerning it.

Q. Do you recall in the same conversation Mr. Coughlin told you that the insurance company had in June, 1946, received what was the equivalent of a 19 per cent increase in premium because the California Transport Company and their affiliates had then obtained a 19 per cent increase in transportation rates, which would increase their gross receipts by that percentage?

A. Yes, I recall something to that effect.

Q. You recall that?

A. Yes.

Q. Do you recall Mr. Coughlin also told you in that conversation that a further increase of rates of transportation was being applied for, and which, if granted, would further increase the insurance premium paid on the basis of the rate contained in Policy 1457?

A. He may have said that.

(Testimony of Henry R. Cantlen.)

Q. When were you first told by Mr. Metallia or Mr. O'Malley that Fidelity would only renew the insurance on a retrospective arrangement?

A. It was first mentioned in our meeting the early part of July.

Q. Well, was the information definitely furnished you in the [220] early part of July that only a retrospective arrangement would be considered, or was the definite information given you at some later time by Fidelity?

A. At a later date.

Q. When was the definite information conveyed to you by Fidelity that the Fidelity would only consider renewal of the insurance policy on a retrospective arrangement?

A. They told me at a meeting that took place about the middle of August—August, August 15th, they indicated that definitely—not definitely, but that the home office were insisting upon the renewal of this contract on a retrospective basis.

Q. Did you thereafter see Mr. Coughlin?

A. Yes, I did.

Q. How long after August 15th, according to your best recollection?

A. According to my file, it was about August 27.

Q. At that meeting at which you saw Mr. Coughlin, did you express to Mr. Coughlin the significance of a retrospective arrangement, what such an arrangement would entail and mean?

A. Yes, I did, sir.

(Testimony of Henry R. Cantlen.)

Q. Did you tell him at that meeting that Fidelity was insisting upon renewal of the insurance upon a retroactive arrangement? A. Yes, I did.

Q. I understood you to say he expressed himself as not being [221] pleased with the idea of a retrospective arrangement? A. He did.

Mr. Murman: Was there an answer to that?

A. Yes.

Q. (By Mr. Eisner): Thereafter you took the matter up with Mr. Mettalia and Mr. O'Malley again, both told you that the company was adamant and that the home office would only consider the business on the basis of a retroactive plan, is that true? A. That is true.

Q. Approximately when was it that Mr. Mettalia or Mr. O'Malley gave you that information?

A. The ultimatum, definite ultimatum, came just prior to the time that the policies were issued, so that would have been in the neighborhood of September 22nd or 23rd.

Q. 1946? A. That is right.

Q. At that same meeting in which Mr. Mettalia and Mr. O'Malley told you that the company was insistent and adamant, did you tell Mr. Mettalia that Mr. Coughlin was opposed to the retrospective plan and the possible penalty involved, but that you were still trying to work it out and get together with him?

A. Yes, I told him the assured was not in favor of the plan.

Q. At that same meeting—withdraw the ques-

(Testimony of Henry R. Cantlen.)

tion. At what meeting was it that Mr. Mettalia told you that the Fidelity [222] would give you a binder pending renewal and would file with the ICC and Railroad Commission?

A. To my recollection, that was at a meeting of August 15th.

Q. As nearly as you can recall, were those the words of Mr. Mettalia?

A. I can't recall his exact words, but it is customary in our business that we have extension of coverage pending a renewal, so I undoubtedly requested he issue a binder pending the renewal of the policy and do the necessary filings with the Commissions.

Q. Did you, in fact, receive the binder, Defendants' Exhibit B, from Mr. Mettalia or Mr. O'Malley approximately on August 27, 1946, showing you that exhibit? A. I received this binder, yes.

Q. Did you receive it about upon the date August 27th, 1946?

A. Undoubtedly it was, because the binder is dated as issued as of August 27th.

Q. Now, Mr. Cantlen, do you have in your possession a copy of a letter that you wrote to Mr. Coughlin on August 27th, 1946, purporting to enclose this binder? Will you look in your file, please? You were given notice to produce that letter, a copy.

A. Wasn't that introduced in evidence yesterday?

Q. No. A. Yes, sir.

Q. Will your produce it, please? This is a copy

(Testimony of Henry R. Cantlen.)

of a letter [223] written by you as Vice President of Bayly, Martin & Fay, to the California Motor Transport Company, on August 27th, 1946?

A. Yes.

Mr. Murman: May I see it?

Mr. Eisner: Yes.

Q. (By Mr. Eisner): I understood you yesterday to say that you brought the binder with you personally to Mr. Coughlin, is that your recollection?

A. That is my recollection.

Q. And today, is it your recollection that, instead of mailing this letter, you brought the letter with you personally, with the binder, and delivered it to Mr. Coughlin?

A. That is possible.

Mr. Eisner: We offer this letter in evidence as Defendants' exhibit next in order.

(The document was marked "Defendants' Exhibit I," in evidence.)

Mr. Eisner: I will read this letter, if the Court please.

(Reading Defendants' Exhibit I.)

Mr. St. Clair: Pardon me, but attached to that letter as it came from the file is a copy of the binder. That is already in evidence.

Mr. Eisner: I will detach the binder, then.

Mr. Murman: No objection to that.

Mr. St. Clair: Thank you. Put that back in the file, Mr. Witness, in its proper place. [224]

Q. (By Mr. Eisner): Now, at the time you received this binder and delivered it to Mr. Coughlin,

(Testimony of Henry R. Cantlen.)

did you know how long the negotiations for renewal would take? A. No, I didn't.

Q. The binder recites that it is for sixty days. Did you observe that? A. Yes.

Q. The negotiations for the renewal of the policy took a great deal more than sixty days, did they not?

A. Yes.

Q. Did you say anything to Mr. Mettalia or Mr. O'Malley, or anyone else connected with the Fidelity, pertaining to an extension of time on the binder?

A. No.

Q. Why not?

A. Because the binder was replaced by policies as issued.

Q. Well, Mr. Cantlen, you didn't say anything to them about the extension of the binder, you are quite sure of that?

A. Just what do you mean, Mr. Eisner?

Q. I mean, the binder originally states it was for sixty days. A. Right.

Q. You notified Mr. Coughlin that this binder would be his comprehensive policy and his coverage pending renewal, didn't you? A. Yes. [225]

Q. Your negotiations for renewal, you say, extended over the sixty-day period?

A. Well, they were still—now, the negotiations closed with the Fidelity & Casualty as of September 24th, the issuance of the policy. Now, that wouldn't necessarily mean, if I may explain, that negotiations could not continue. We could still endeavor to im-

(Testimony of Henry R. Cantlen.)

prove the situation or change the situation, regardless of the issuance of the contract.

Q. Mr. Cantlen, it wasn't until early October that you received the policies from Fidelity, is that correct?

A. It was some time just shortly after September 24th.

Q. At the same time you received the retrospective agreement? A. Yes.

Q. That was handed to you at the same time?

A. Yes.

Q. And then you have testified that you took up with Mr. Coughlin the question of whether or not he would be agreeable to the retrospective agreement? A. Yes, sir.

Q. And thereafter, and some time in October, the company officials told you that the company was adamant and insisted upon the retrospective agreement?

Mr. Murman: Objected to on the ground that that is not the evidence.

Q. (By Mr. Eisner): What is the fact, Mr. Cantlen? [226]

A. Well, it was just prior to September 24th, the issuance of the policies, that Mr. Mettalia delivered his ultimatum to me.

Q. Did you ever tell Mr. Coughlin that the binder would terminate or was terminating at the expiration of sixty days?

A. I don't know if I told him exactly that the binder—the binder spoke for itself.

(Testimony of Henry R. Cantlen.)

Q. Well, Mr. Cantlen, at the time you delivered this binder to Mr. Coughlin, you told him that the Fidelity still insisted upon the retrospective plan, but that you were still endeavoring to get a guaranteed rate and for negotiating with Fidelity and also other companies, isn't that true?

A. That is true, sir.

Q. You had been renewing the California Motor Transport Company's public liability coverage for several years, had you not? A. Yes, sir.

Q. Had you ever before had a binder issued for the California Motor Transport Company?

A. I would have to refer to my files, Mr. Eisner. I don't know.

Q. Well, what is your best recollection upon that matter?

A. Well, we may or may not, depending on when the renewal policies were issued.

Q. According to your best recollection, is it a fact that in all prior instances the renewal policies were issued and delivered to the insurance prior to the expiration date of the [227] old policy?

A. That may be——

Mr. Murman: Objected to as argumentative.

The Court: Overruled.

A. That may be true, because we were able—well, that may be true.

Mr. St. Clair: Well, the witness can explain.

A. I would like to qualify it, if I may.

Q. (By Mr. Eisner): If you want to qualify the answer, you may.

(Testimony of Henry R. Cantlen.)

A. That is possibly true, because since 1941 this was the first renewal in which rate increase was involved.

Q. Notices had to be given to the ICC and the Railroad Commission to satisfy these bureaus that there was insurance coverage for the transportation company, is that true? A. Yes, sir.

Q. Which, in giving this notice, the coverage was indicated by policy numbers, although no policies had been issued or agreed upon at the time those numbers were given, is that true?

Mr. Murman: Objected to as complex. "Issued or agreed upon." That is a complex question.

Mr. St. Clair: I object to it on the ground it isn't within the cross-examination. It wasn't within the direct examination.

The Court: You will have to modify it.

Mr. St. Clair: All right. [228]

Q. (By Mr. Eisner): On August 27th, 1946, when you wrote this letter to California Motor Transport Company—

Mr. Murman: Is that Exhibit I, Mr. Eisner, just so the record is clear?

Mr. Eisner: Yes, Exhibit I.

Q. —had any policies been issued at that time?

A. No, sir.

Q. You are familiar with the notice and the fact the notice had been given to the ICC and the Railroad Commission prior to the time of the date of your letter of August 27th, 1946, is that correct?

A. That is possible.

(Testimony of Henry R. Cantlen.)

Q. Now, these numbers that were given were simply arbitrary or selected numbers to indicate that the transportation company was covered by insurance?

Mr. Murman: Objected to as calling for a conclusion of the witness.

Mr. St. Clair: I object to it as being outside the cross-examination of this witness.

The Court: Sustain the objection on both grounds.

Q. (By Mr. Eisner): Were these numbers simply for the purpose of indicating to the Commissions that insurance coverage existed for the transportation company?

Mr. Murman: Same objection.

Mr. St. Clair: Same objection. [229]

The Court: I think so, Mr. Eisner, for this reason: He said that he doesn't remember he had copies of those, in the first place; and he didn't draw them, in the second place; so it would be a conclusion, in the third place.

Mr. Eisner: Well, I think it is sufficiently in evidence, anyway.

Q. Now, Mr. Cantlen, binders are issued for the purpose of temporarily covering insured for new risks, as well as for old risks, pending renewals?

A. Correct, sir.

Q. Is a risk such as that of the California Motor Transport Company a matter of negotiated premium rate based on loss experience? A. Yes, sir.

Q. It isn't a risk covered by what is referred to

(Testimony of Henry R. Cantlen.)

as the "Manual of Rates," is it? A. No, sir.

Q. Then, the statement in this binder, Defendants' Exhibit B, at the bottom of this printed form, "If the company accepts the risk, the policy issued shall supersede this binder, and the policy term shall begin on the binder date. If the risk is not accepted, this binder may run to expiration, or the company may cancel by mailing notice to the insured and to the broker or agent upon whose application it was issued. A premium charge at the rates and in compliance with the rules of the manual of [230] rates in use by the company when this binder becomes effective will be made for the time this binder is in effect if no policy of insurance in place hereof is issued and accepted by the insured," this reference to the manual of rates in this binder has no bearing on the policy such as was issued, No. 1457, to the California Motor Transport Company? A. Absolutely none.

The Court: Mr. Eisner, will you excuse me? I have a call from one of the judges. I would like to answer the phone.

(Thereupon, a short recess was taken.)

Q. (By Mr. Eisner): Mr. Cantlen, you have testified—you have already stated you received the policies and the retrospective agreement together the last of September, 1946?

A. That is my recollection.

Q. And you brought the retrospective agreement out to Mr. Coughlin? A. That is right, sir.

Q. And you kept the policies?

(Testimony of Henry R. Cantlen.)

A. That is right, sir.

Q. In your office, is that correct?

A. That is right.

Q. And you did not show them to Mr. Coughlin?

A. Not at that time.

Q. Did you at any time show them to Mr. Coughlin prior to October, 1947? [231]

A. No.

Q. Are you sure that you even told Mr. Coughlin that any policies had been received by you from Fidelity?

A. Yes, I am quite sure.

Q. When did you tell him that?

A. At the time of delivering the retrospective agreement.

Q. Do you have any definite recollection of having told Mr. Coughlin at that time that policies had been received by you from Fidelity at the same time as they delivered to you the retrospective agreement?

A. I feel certain I did.

Q. Do you have any definite recollection of it?

Mr. Murman: It has been asked and answered, Mr. Eisner.

Mr. Eisner: He says, "I feel certain of it." I think that is a conclusion.

Q. Do you have any recollection of having made any such statement?

A. Yes, I think I did, Mr. Eisner.

Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of \$2.20, as compared with the rate of 1.223, which he had been paying?

A. No, he did not.

(Testimony of Henry R. Cantlen.)

Q. Did you ever tell Mr. Mattalia or Mr. O'Malley that California Transport Company would accept policies with a 2.20 rate? [232]

A. No, I did not.

Q. Why did Bayly, Martin & Fay not deliver Policies 20950 and 20968 to California Motors prior to October 22nd, 1947?

A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion, the transaction wasn't completed.

Mr. Murman: I move to strike out the latter part of that answer as a conclusion of the witness, infringing upon the province of the Court. That is the real legal point here, Your Honor.

The Court: I think I will let the answer stand. He is just giving his reasons why he didn't deliver the policies.

Mr. Murman: Yes, Your Honor.

Q. (By Mr. Eisner): It is your practice, and the practice of Bayly, Martin & Fay, to deliver policies to the insured as soon as they are issued and checked, is that true?

A. Yes, within a reasonable time.

Q. You are also familiar with the fact that Section 383.5, California Insurance Code, makes it the duty of the agent or broker to deliver the original or a copy of any policy with the assured when issued?

(Testimony of Henry R. Cantlen.)

A. No, I am not familiar with that section.

Q. On October 22nd, 1947, you brought out to Mr. Coughlin [233] Plaintiff's Exhibit 17, a letter from Bayly, Martin & Fay, dated August 7, 1947?

A. No, sir; Mr. Coughlin wasn't there.

Q. To whom did you deliver it?

A. Mr. Davis.

Q. And this letter was written by you August 7, 1947, is that right? A. That is right.

Q. And held in your possession from August 7, 1947, until October 27th, 1947?

A. That is correct.

Q. Without being mailed or sent?

A. That is correct.

Q. On October 27th, 1947, you took it with you to Mr. Davis? A. That is right.

Q. Went over to the California Motor Transport Company and delivered to him this letter, Plaintiff's Exhibit 17, together with the policies?

A. That is right.

Q. No. 20950 and 20968, the policies?

A. That is correct.

Q. From Fidelity & Casualty Company, for the additional premium? A. That is right.

Q. Now, then, you had received from Fidelity & Deposit Company, on April 19, or thereabouts, 1947, the statements which are [234] annexed as a part of Plaintiff's Exhibit 13?

Mr. St. Clair: I object to that on the ground it is something not in evidence. The evidence shows this was sent—a bill was sent in July, as he said.

(Testimony of Henry R. Cantlen.)

Mr. Murman: He said that was a different bill. This is not the auditor's statement which Mr. Challengburg testified was sent out on that date. This is not the cashier's bill.

Mr. St. Clair: Oh.

A. What was the question?

The Court: Read the question.

(The question was read by the reporter.)

Q. (By Mr. Eisner): And the statements show that a charge was being made under that date to California Motor Transportation Company for this additional premium, based on the 2.20 rate?

A. That is right.

Q. Then did you communicate with California Motor Transport Company, when you received these statements, and tell them you had received a bill or statement or notification from Fidelity & Casualty Company that they were demanding the premium at the rate of 2.20? A. I did not.

Q. By the way, was this the first time that you heard from Fidelity & Casualty Company that it was claiming, or intended to claim, a premium on this insurance that existed between September 1st, 1946, and January 21st, 1947, at the rate of 2.20?

A. Yes.

Q. That was the first notification you had?

A. Yes.

Q. Had you, prior to that time, received any notification from the Fidelity & Casualty Company that they were asking any premium, in addition to that which you had remitted to them, on behalf of the insured? A. That is right.

(Testimony of Henry R. Cantlen.)

Q. When you say "That is right," you had not received—I understand your answer to mean you hadn't received any such notice from the Fidelity & Casualty Company.

A. I did not receive any notification.

Q. After you received this statement of April 19th, 1947, did you take the matter up with Fidelity & Casualty Company? A. I did.

Q. With whom did you take it up?

A. I took it up with, first, with Mr. Mettalia.

Q. Did you tell him that, in your opinion, the company wasn't justified in claiming additional premiums?

A. I told him that I did not believe that they were entitled to the 2.20 rate on the earned premium developed, or, in the gross receipts reported.

Q. What was your full conversation with him pertaining to that?

A. I contended that the rate was excessive; in other words, they were charging this earned premium on a guaranteed basis, [236] and that I would not—the assured never agreed to pay 2.20 on a guaranteed basis, and I felt that the rate was excessive on the guaranteed basis. Mr. Mettalia contended that the company would not have issued the policies at a lower rate on a guaranteed basis, and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of 2.20.

Q. Did you thereafter take the matter up with anyone of the company, other than Mr. Mettalia?

(Testimony of Henry R. Cantlen.)

A. Yes.

Q. With whom?

A. It was a man that was—I think the title was Resident Manager or Resident Vice President, Mr. Floyd Anderson, who was in charge of the company on the Pacific Coast, and we had conferences with him on the subject.

Q. Did you tell him that same thing you had told Mr. Mettalia? A. Yes.

Q. Did you tell him anything in addition to that?

A. Well, I made the same contention as I made to Mr. Mettalia, and I did not agree or ever felt that they were entitled to charge on a guaranteed basis rate, the rate that was proposed on a retrospective basis.

Q. Now, when you went out to see Mr. Coughlin on October 22nd, 1947, and bore with you, as you have stated, the policies and the bill, did you also bring with you a draft of a letter which [237] you told Mr. Davis to copy and write to Bayly, Martin & Fay?

A. I don't know if I brought a draft. As I recall, I assisted him in dictating such a letter.

Q. You don't remember that you had already written, already had it typewritten?

A. I may have. No, it seems to me like Bill dictated the letter into the Dictograph and I assisted him in dictating it.

Q. Is it not a fact that he dictated the letter into the Dictograph from the typewritten copy of the

(Testimony of Henry R. Cantlen.)

letter which you presented to him at that time and which you had brought with you?

A. That could be possible, but I don't recall it that way.

Q. Now, I show you this letter, Plaintiff's Exhibit 18, Mr. Cantlen, and I ask you if that is the letter which Mr. Davis dictated into the machine, in your presence?

A. That is correct, sir.

The Court: Is that Exhibit 18, Mr. Eisner?

Mr. Eisner: Exhibit 18, Your Honor, yes.

Q. I call your attention to this paragraph: "During the aforementioned period, namely, from September 1, 1946, to January 21, 1947, we attempted through you to negotiate a renewal arrangement with the Fidelity & Casualty Company, but in view of the arrangements which were offered to us we found it inadvisable to continue with this company."

Did you, yourself, draft that paragraph? [238]

A. I may have, yes.

Q. Is that statement true?

Mr. Murman: Well, I think the letter speaks for itself. Your Honor. It is an attempt to vary the terms of a written document.

The Court: Oh, I don't think so. I think I will allow it.

Mr. St. Clair: More properly, it is improper cross-examination, it not having been gone into on this subject.

Mr. Murman: I introduced that.

(Testimony of Henry R. Cantlen.)

Mr. Eisner: The letter was introduced on direct examination.

Mr. St. Clair: Not by this witness, though.

Mr. Murman: Yes, that is correct.

The Court: The question is whether or not that statement that was just read to you from that letter was true. A. Yes.

Q. (By Mr. Eisner): I call your attention to this statement: "At no time did we agree to a rate of \$2.20 as against our former rate of \$1.223."

Did you draft that statement?

A. That is true.

Q. Is that statement true? A. Yes.

Q. "It is therefore necessary for us to decline payment of your invoices submitted in view of the aforementioned reason." [239]

Did you draft that statement? A. Yes.

Q. Now, Mr. Cantlen, did you make any effort to collect from California Motor Transport Company the deposit premiums called for by Policy No. 20950 and 20968?

Mr. Murman: I object to that, not within the scope of the direct examination. There was no testimony on direct concerning deposit premium, and our position is, so far as this case is concerned, it is not within the issues and it is incompetent, irrelevant and immaterial.

The Court: Sustained on the ground that it was not in the direct examination of this witness.

Mr. Eisner: I don't know whether that is true, but it does seem to me counsel—of course, if you

(Testimony of Henry R. Cantlen.)

are insisting—we have a third party complaint as against Bayly, Martin & Fay, and if you want to segregate it and lengthen this case by recalling the witness upon it, it will be necessary to do so.

Mr. Murman: I stand on my objection because I don't think it is part of my case.

Mr. St. Clair: If Mr. Eisner is prepared to be bound by the answers, I have no objection, if he wants to ask him the question, whether or not it is improper cross-examination. If he wants to call this witness as his own——

The Court: That is true, it is improper cross-examination.

Mr. St. Clair: If he wants to be bound by it, I have no [240] objection to it.

The Court: He wouldn't be bound by it, not under Rule 43.

Mr. Eisner: That is true.

The Court: Which is a replica of Section 2055, CCP.

Mr. Eisner: Yes.

Q. Well, I will ask you this: I don't think it is objectionable. Did Bayly, Martin & Fay receive any bills from Fidelity & Casualty Company for the deposit premium?

Mr. Murman: Same objection.

The Court: I think, to be consistent, I will have to make the same ruling.

Mr. Eisner: All right.

Q. Now, Mr. Cantlen, Bayly, Martin & Fay received reports and remittances from California

(Testimony of Henry R. Cantlen.)

Motor Transport Company after September 1st, 1946? A. Correct.

Q. I am going to show you——

Mr. Eisner: Do you want to see this (showing documents to counsel)?

Q. Mr. Cantlen, I show you a check dated November 7, 1946, which shows as having been cashed and made payable to Spengler & Johnstone, Inc., and ask you if you recognize that check as one of the checks from California Motor Transport Company covering the September receipts?

A. Yes, it is, Mr. Eisner. [241]

Q. This check, which shows as having been cashed, had attached to it a voucher portion, is that correct? A. Yes.

Q. Those voucher portions you have in your possession and referred to yesterday? A. Yes.

Q. For the purpose of convenience, I will ask you to look at the carbon copy annexed to the— attached to the check, which has been cashed, and ask you if you recognize it as the carbon copy on the entire check, including the voucher portion, that was remitted to you by California Motor Transport Company? A. Yes.

Q. Then, for the month of September, California Motor Transport Company and its affiliates sent you four separate checks, is that true, which I now show you? A. That would be right.

Q. And these were received by you on or about November 8th, 1946?

A. Undoubtedly, it was November 8th, because

(Testimony of Henry R. Cantlen.)

the stamp—this is our stamp—shows the 8th here. The November—but that is undoubtedly right. Well, this one came on the 13th, you see.

Q. Mr. Cantlen, these checks were combined remittances covering cargo insurance, as well as the “PF” and “PD”?

A. “PL” and “PD,” that is right, on the automobiles.

Q. The check shows on the voucher portion and the check shows [242] upon the face that the “PL” and “PD” insurance premium is calculated in each instance as 1.223, is that correct?

A. That is correct.

Mr. Eisner: We offer these checks in evidence as one exhibit. These cover the month of September.

(Documents Were Marked “Defendants’ Exhibit J,” in Evidence.)

Q. (By Mr. Eisner): Mr. Cantlen, for the month of October, 1946, I show you checks from California Motor Transport Company, dated December 10, 1946.

Mr. St. Clair: I will stipulate to the checks, Mr. Eisner, if it will simplify it, for the purpose of the record.

A. Yes.

Mr. Murman: I have no question but what the defendants sent those checks to Bayly, Martin & Fay, and I think they should be marked separately as exhibits.

Mr. St. Clair: If Mr. Eisner will tell us those are their checks, that will be satisfactory with me.

(Testimony of Henry R. Cantlen.)

Mr. Eisner: These are the checks and carbon copies of vouchers for the entire checks.

The Court: Those show the rate as 1.223?

Mr. Eisner: Yes, throughout.

Mr. Murman: Those, of course, only went between the defendants' and Mr. Cantlen's office. They did not come to the plaintiff. You are not contending that?

Mr. Eisner: They went to the office of Bayly, Martin & Fay, [243] but whether they went to the Fidelity & Casualty Company through the agency of Bayly, Martin & Fay is another question. In other words, whether or not Bayly, Martin & Fay was the agent of Fidelity & Casualty Company for the purpose of receiving cash and collecting the premium is another question, but physically——

Mr. Murman: That is the reason I want to clear up the point. I am only stipulating that those are the checks that the defendants in this case sent to Bayly, Martin & Fay covering the voluntary audits or monthly reports for the months they show.

The Court: That is the only purpose of this evidence, so far?

Mr. Murman: Yes, Your Honor.

(Documents Were Marked "Defendants' Exhibit K," in Evidence.)

Mr. Eisner: We offer in evidence, as Defendants' exhibit next in order, check dated January 16, 1947, covering the month of November, 1946, and each one of these checks and voucher check likewise show upon its face that the rate is 1.223.

(Testimony of Henry R. Cantlen.)

(A Document Was Marked "Defendants' Exhibit L," in Evidence.)

Mr. Eisner: And we offer in evidence, as Defendants' exhibit next in order, checks dated February 20, 1947, covering the month of December, 1946, and each one of these checks, likewise, showing upon the face the rate of 1.223.

(Document Was Marked "Defendants' Exhibit M," in Evidence.) [244]

Mr. Eisner: We offer in evidence, as Defendants' exhibit next in order, checks dated March 25, 1947, covering the period from January 1st, 1947, to January 21st—to January 19, 1947, inclusive, and showing upon their face the same rate.

(Documents Were Marked "Defendants' Exhibit N," in Evidence.)

Q. (By Mr. Eisner): Now, Mr. Cantlen, when you received these voucher checks or remittances, did you—you accepted them from California Motor Transport Company without any protest or objection, that is true, is it not? A. Yes.

Q. Is it a fact that Fidelity & Deposit Company looked to Bayly, Martin & Fay to collect the premium from the insured and remit to Fidelity & Casualty Company?

Mr. Murman: Objected to as calling for a conclusion of the witness.

Mr. Eisner: If he knows whether or not the Fidelity & Casualty Company looked to Bayly, Martin & Fay.

(Testimony of Henry R. Cantlen.)

Mr. Murman: I don't see how he can testify to that. He can testify what arrangement might have been between them.

Mr. Eisner: Withdraw it, then.

Q. Was it the arrangement between Bayly, Martin & Fay and Fidelity & Casualty Company that Bayly, Martin & Fay should collect the premium from the California Motor Transport Company and remit it to the Fidelity & Casualty Company? A. That is correct. [245]

Q. That arrangement pertained not only to the premium of California Motor Transport Company but to all other premiums and insurance that were placed through the office of Bayly, Martin & Fay and written by the Fidelity & Casualty Company?

A. That is true.

The Court: Let me clear this up. In other words, you, as broker, not only placed this insurance but placed other insurance for them for the other companies?

A. That is correct.

The Court: You collected the money from them that was due each of these companies and remitted it?

A. Yes. In these vouchers, there was another company involved other than the Fidelity & Casualty Insurance Company.

Mr. St. Clair: You mean other than the California Motor Transport Company?

A. No, another than Fidelity & Casualty.

Mr. St. Clair: In other words, on these vouchers, you collected money from California Motor Trans-

(Testimony of Henry R. Cantlen.)

port Company that was due not only on account of the premium of Fidelity & Casualty Company, but another company as well?

A. That is correct.

Mr. Eisner: The company that had written the cargo insurance?

A. That is correct.

The Court: Did you place any other insurance other than [246] these for the defendants?

A. Yes.

The Court: Placed other lines, too?

A. Yes.

The Court: Then collected the money from them and remitted it to the particular insurance company involved?

A. With all of our business.

Q. (By Mr. Eisner): Then, as I understand it, it was your practice to wait sixty to ninety days before turning the money over to the insurance company?

A. Not necessarily, Mr. Eisner. Our practice is that as of a certain day of the month we remit, ordinarily, to the insurance companies funds of those insurance companies collected during that particular month.

Q. Now, you collected from the California Motor Transport Company the September premium, my recollection is, in the month of November, November 7th, 1946?

A. Yes.

Q. When did you remit to the Fidelity & Cas-

(Testimony of Henry R. Cantlen.)

ualty Company the premium that you had so collected? A. For the month of September?

Q. Yes.

A. We remitted September and October—we forwarded the reports for September and October, our computation here, according to this record, on January 27. [247]

Q. 1947?

A. 1947. Any time we remitted the money can be determined from its remittance sheets.

Mr. St. Clair: The checks are marked for identification, Mr. Eisner, but are not actually in evidence yet, the checks from Bayly, Martin & Fay to the insurance company. I believe, however, it is about that same date. The checks are dated January 28th, I believe.

The Court: I think they run from D to G.

Mr. Murman: That is correct.

Q. (By Mr. Eisner): Counsel drew my attention to checks which run from "D" to "G," Defendants' Exhibits. It is a fact, then, Mr. Cantlen, the money you collected on November 7, 1946, was remitted on January 28, 1947?

A. No. Yes, the remittance is made, according to that, November, 1946, and was remitted to the company on January 28, 1947.

Q. Yes. When you received these voucher checks, Mr. Cantlen, as you have stated, they covered a combined premium, that is, premium not only on the public liability but also on cargo insurance?

A. That is right.

(Testimony of Henry R. Cantlen.)

Q. So it was necessary for you to process—I believe you used the word—— A. Yes. [248]

Q. —these reports, is that true?

A. That is true.

Q. Then you took these voucher checks with the information contained thereon, and from those voucher checks you made up Plaintiff's Exhibit 10?

A. When I say I did, I mean my office did. I did not do it personally.

Q. Well, was it done under your supervision?

A. It would be done under my supervision, yes.

Q. When, according to your best recollection, was Plaintiff's Exhibit 10 prepared in your office?

Mr. Murman: That exhibit has five different documents attached to it covering different dates.

A. Let's see; that is—now, September and October, 1946, were prepared, would have been prepared, just prior to January 27th, in our office——

Q. (By Mr. Eisner): Yes.

A. —and forwarded on to the insurance company. Does that answer the question?

Q. Then——

A. Now, November, according to this file, was prepared just prior to January 30, 1947.

Q. Yes.

A. December was prepared just prior to February 24th.

Q. 1947? [249] A. Yes.

Q. Now, then, Mr. Cantlen, upon these voucher checks that you had received from California

(Testimony of Henry R. Cantlen.)

Motor Transport Company, the rate for public liability was shown as 1.223, is that correct?

A. That is correct.

Q. And in your processing of those reports received from California Motor Transport Company, I understand you broke down that 1.223 into two parts, .997 and .226, the .997 covering primary public liability and the .226 property damage, is that correct?

A. Well, the only misstatement you make is that the .997 is for the combined. There was no primary or excess in existence under this rating.

Q. In other words, the .997 was the entire public liability rate?

A. The liability portion, yes.

Q. And the .226 was the entire property damage?

A. Automobile property damage.

Q. And did these rates that are shown upon this report which was prepared are the same rates that are contained in Policy 1457 that was in existence from September 1st, 1945, to September 1st, 1946?

A. That is correct.

Q. Now, then, Mr. Cantlen, you sent these reports under the dates you have mentioned to the Fidelity & Casualty Company? [250]

A. Yes, sir.

Q. Did you receive any protest or objection of any kind from the Fidelity & Casualty Company?

A. No, we did not.

Q. Your checks to the Fidelity & Casualty Company were cashed?

A. Yes, they were.

(Testimony of Henry R. Cantlen.)

Q. And you did not hear anything by way of objection or claim of additional premium until you received copies of the statements dated April 14, 1947?

A. Well, you call that the final audit.

Q. Are those what you refer to as the final audit?

A. That is correct.

Q. By the way, these final audits are simply checks made of the records of the insured to determine whether or not the insured has properly reported his gross receipts?

Mr. Murman: No, that is not the truth.

The Court: The witness already testified it is so as to determine whether they were figured on the proper premium rate, and also whether or not it includes—been properly classified as to risk, is that about right?

A. Yes, the exposures and the receipts.

Q. (By Mr. Eisner): Then, the first information you have received from Fidelity & Casualty Company was after this final audit of April 14, 1947?

A. That is correct. [251]

Q. When was it that Mr. Mettalia told you that the home office insisted upon the policies being declared and the retrospective agreement executed?

A. As I testified, it was just prior to September 24th.

Q. And thereafter you continued to try to work out an agreement with Fidelity & Casualty Company, and also to place the insurance elsewhere?

A. Correct.

Q. And Mr. Coughlin was just as adamant in

(Testimony of Henry R. Cantlen.)

refusing the retrospective agreement as the company was in insisting upon it? A. That is right.

Q. Finally, on December 19, 1946, you received copies of notices of the cancellation to be effective on January 21st, 1947? A. That is right.

Q. Did you then tell Mr. Coughlin the binder would terminate on January 21st, 1947, and that he had until that date to place the insurance elsewhere?

Mr. Murman: Objected to as incompetent, irrelevant, and immaterial, an attempt to vary the terms of a written instrument. The binder speaks for itself.

The Court: He is asking about a conversation, not what was in the written instrument. Overruled.

The Witness: May I hear the question again?

(The question was read by the reporter.)

Q. (By Mr. Eisner): Did you then tell Mr. Coughlin as of the receipt of the notice of that cancellation that the binder would terminate on January 21st, 1947, and that the Company had until that date to place the insurance elsewhere?

A. No.

Q. Did you at any time tell Mr. Coughlin his coverage under the binder would end prior to the time that the notice of cancellation was received in December? A. No.

Q. You never said anything to Mr. Coughlin

(Testimony of Henry R. Cantlen.)

about the binder being cancelled——

A. No.

Q. ——or terminated?

I think that is all, if the Court please.

The Court: We will take a recess of about five minutes.

(Thereupon, a short recess was taken.)

Mr. St. Clair: If Your Honor please, it appears to me, although I would be giving up a slight advantage, it would be better for me to take this witness as my own witness and put in the direct, as well as any rebuttal, and counsel are agreeable to that.

The Court: That will shorten it.

Mr. St. Clair: Yes. However, Mr. Murman wishes to ask some questions, and then he can technically rest his case.

Mr. Murman: I haven't rested yet, and I thought I could [253] put in the redirect examination, then rest, and that would bring my part of the case to a conclusion.

Redirect Examination

By Mr. Murman:

Q. Mr. Cantlen, as to this matter of rate, which is reflected by the policies in question, Plaintiff's Exhibits 3 and 4, the renewal policies, as I understood your previous testimony, you did have some discussion with Mr. Coughlin concerning increase in rates prior to the renewal, did you not?

A. Yes.

(Testimony of Henry R. Cantlen.)

Q. Isn't it true, at that time, that the National Bureau, the same bureau to which this matter of the rate was submitted, as evidenced by Plaintiff's Exhibit 1—you have seen that, have you not?—had known of the general increase in rate throughout the whole country on this type of contract?

A. Well, there was a general increase in all automobile insurance lines as of January 1st, 1946.

Q. That came during the time that the contract No. 1457 was already in force?

A. That is right.

Q. So that the call for increase in rates would refer to the renewal, would it not, not the existing contract?

A. Well, that would still be dependent on experience. The fact that this bureau increased the automobile insurance rates would not have a particular effect on this risk. The renewal [254] rate would be dependent on the experience that the company would have witnessed under the existing contract and previous contract.

Q. In that connection, you had already inquired concerning the experience and had received, had you not, from Mr. Mettalia a statement of the loss ratio on the various contracts in August, 1941?

A. In July.

Q. So that you, at that time, knew something concerning the increase in rates that they were contemplating?

A. I felt there would be an increase.

Q. You stated that to Mr. Coughlin, did you not?

(Testimony of Henry R. Cantlen.)

A. Yes.

Q. So that, although the exact amount of 2.20 was never mentioned, there was conversation about a rate increase? A. Correct.

Q. Did you want to look at this? I interrupted you. This is Plaintiff's Exhibit 1, regarding the rate.

A. I don't see that this has any bearing.

Q. When you got the policies, Plaintiff's Exhibits 3 and 4, 20968 and 20950, did you look through them at all, read them over, examine them?

A. Oh, yes.

Q. Did you look at the portion of them that sets up the rate for the particular policy? [255]

A. Yes.

Q. Did you notice that for Policy No. 20968, which is Plaintiff's Exhibit 3, there was set forth therein on Endorsement No. 7 that the rate per hundred dollars of gross earnings was \$2.00, final rate to be determined by audit? A. Yes.

Q. This policy was in your possession, I think you said, the latter part of December, 1946?

A. That is right.

Q. Did you also notice a similar endorsement in No. 20968 where the rate was to be twenty cents for the excess— A. Yes.

Q. —subject to final audit? So that at the time you got these policies from the plaintiff in this case you were aware that the policies themselves set up those rates, is that correct?

(Testimony of Henry R. Cantlen.)

A. Yes, they set up those rates, but they are issued in conjunction with another agreement.

Q. I would like to have you take Policy No. 20968, which is the primary policy, Plaintiff's Exhibit 3, and point out to the Court where in that policy there is any reference made to the retrospective agreement.

A. It would not be necessary to be referred to in here because the policies were definitely issued with the understanding that the retrospective agreement would be entered into. [256]

Q. There is, however, nothing in the policy itself that refers to retrospective agreement?

Mr. St. Clair: The policy speaks for itself.

Mr. Murman: That is correct, but I am asking him to point it out, if there is anything.

A. I don't see that it makes any difference.

The Court: There isn't in 20968, but there is in the other.

Mr. Murman: There is a reference to that, but not to the rate, that is, in the primary, Your Honor.

The Court: Well, the documents will show.

Mr. Murman: Yes, Your Honor.

Q. Now, I believe you testified, Mr. Cantlen, that during this period of time you referred to the company for handling a claim, which was identified as Plaintiff's Exhibit 16, referring specifically to the portion setting forth the rates that we have been talking about, and you did that irrespective of the fact that the retrospective agreement had not yet been signed, isn't that correct?

(Testimony of Henry R. Cantlen.)

A. That is right.

Q. In other words, you expected the company to handle this claim, even though it was claimed the defendants in this case hadn't signed the retrospective agreement, is that right?

A. That is right.

Q. And that is one of the exhibits you said you had not yourself forwarded but that went directly from the defendants to [257] the plaintiff, or was sent in to the plaintiff for handling, even though there had been no signing on the retrospective agreement, is that correct? A. That is right.

Q. Now, on these voluntary audits that you developed through processing the defendants' reports to you concerning gross earnings and premiums which they calculated had been earned on those gross earnings, those voluntary audits were again sent in with specific reference to the policies 20950 and 20968, isn't that correct?

A. That is right.

Q. At that time you had the policies in your possession? A. That is right.

Q. You had examined and seen an endorsement in them regarding rates, isn't that correct?

A. That is right.

Q. And you also knew, did you not, Mr. Cantlen, that these reports were subject to final audit, as you have stated? A. Yes.

Q. The cancellation which took place, as evidenced by Plaintiff's Exhibits 5 and 6, that took place before any remittances by you to the com-

(Testimony of Henry R. Cantlen.)

pany on the basis of these reports or voluntary audits, isn't that correct?

A. That is correct.

Q. And it was after the cancellation notices that you did make [258] those remittances?

A. That is correct.

Q. And I believe some of them were made even after the date of the cancellation, isn't that correct?

A. Yes.

Q. And those remittances were also made following notice to the defendants that their filings with the Railroad Commission had also been cancelled the same time as the cancellation of the policies, isn't that correct?

A. Well, I never saw that.

Q. You mean Plaintiff's Exhibit 2—maybe I have gotten the filing date here. Anyway, you didn't see the notice of cancellation that was sent out—

A. No.

Q. —to the company?

A. To the Commission.

Q. No, to the company, a copy to the Commission. You didn't see that?

A. No.

Q. I mean to the defendants; pardon me.

A. No.

Q. On the previous contracts that I referred you to here in the letter which you got from Mr. Mettalia, your Exhibit BB, in these previous contracts running from 1947 to 1946, 1945, were there final audits in the case of each of those contracts? [259]

A. Yes, there was.

(Testimony of Henry R. Cantlen.)

Q. And there was a premium payable to the company on the basis of those final audits, after the voluntary audits had taken place?

A. I would have to check that. There might be either an additional premium or return premium.

Q. Anyway, there was a final adjustment of premium in each case? A. Correct.

Q. And with respect to the final audit in this case as to the particular policies with which we are concerned, Plaintiff's Exhibits 3 and 4, in April of 1947, that was in the usual handling of the insurance problem, wasn't it? I mean, there is nothing unusual about receiving those final audits.

A. To receive the audit, no.

Q. You expected there would be a final audit?

A. Yes.

Q. Covering the period the policy was in effect prior to cancellation? A. Yes.

Q. One other question, Mr. Cantlen——

Mr. Murman: I think you covered it, though. No further questions.

Mr. Eisner: I have one more question.

Mr. Murman: I would like to rest my case, Mr. Eisner. If [260] you want to ask it during my case, all right.

Mr. Eisner: All right.

Cross-Examination

By Mr. Eisner:

Q. You have spoken about the numbers, and I

(Testimony of Henry R. Cantlen.)

want to ask you if it is a fact whenever, after August 27th, 1946, the insurance coverage by Fidelity of California Motor Transport Company was referred to, it was referred to by policy numbers 20950 and 20968?

A. I don't understand your question.

Q. Well, the binder was issued on August 27, 1946, wasn't it? A. Yes.

Q. The notification was given to the Interstate Commerce Commission and the Railroad Commission prior to August 27th, 1946, pertaining to coverage of the California Motor Transport Company?

A. Correct.

Q. In those notices, the Railroad Commission and Interstate Commerce Commission, prior to August 27th, 1946, the notification stated that the coverage was reflected by Policies 20950 and 20968.

Mr. Murman: I think just 20968.

Q. (By Mr. Eisner): All right; 20968, is that it?

A. Yes.

Q. At that time, no policy 20968 was in existence?

A. Well, it was in existence but not written.

Q. No rate or terms had been agreed upon for that policy? A. No.

Q. After August 27th, 1946, whenever the coverage by Fidelity & Casualty Company of California Motor Transport Company was referred to in any communications between your office and Fidelity & Casualty Company or Fidelity & Casualty Company and your office, was that coverage re-

(Testimony of Henry R. Cantlen.)

ferred to or identified in the same manner as Policy 20968? A. My recollection, it was.

Q. It was so referred to? A. Yes.

Mr. Eisner: That is all.

Mr. Murman: At this time, if the Court please, the plaintiff rests its case.

(Plaintiff rests.)

Mr. St. Clair: Pursuant to our understanding, Your Honor, I will call this witness as my witness for and on behalf of Bayly, Martin & Fay, and will attempt to also do a little redirect examination—I guess cross-examination, I mean.

Direct Examination

By Mr. St. Clair:

Q. Mr. Cantlen, I hand you a file and ask you if that is a file taken from the files of Bayly, Martin & Fay? A. Yes, it is.

Q. It should—I hope it does—cover the policy year of [262] September 1, 1941, to September 1, 1942, is that correct? A. Yes, it does.

Q. Prior to September 1, 1941, did you have any conversation or conversations with Mr. Coughlin, who is the president of one of the defendants herein, in regard to insurance? A. Yes.

Q. At that time, was Mr. Coughlin's company insurance, being handled, that is, its public liability insurance, being handled by Bayly, Martin & Fay as his broker? A. No, it wasn't.

Q. When you had this conversation with Mr. Coughlin, what month was it, do you recall?

(Testimony of Henry R. Cantlen.)

A. Oh, my best recollection would be around July of 1941.

Q. Where did you have the conversation?

A. At his office.

Q. Who was there?

A. Mr. Coughlin, and I recall Mr. Spengler was with me.

Q. Who was then an associate of Bayly, Martin & Fay? A. Yes.

Q. He was a broker? A. Yes.

Q. What was the conversation with Coughlin at that time?

A. We were talking to Mr. Coughlin about the possibility of our writing his comprehensive liability and property damage coverage, it having been previously handled by Spengler & [263] Johnstone. Spengler & Johnstone had affiliated with us, and we had a general discussion about his existing coverage and how he was getting along with his present carrier, and he indicated to me at that time that if we could work out an arrangement which he considered satisfactory he might entertain the idea of we again handling this account.

Q. And did he indicate the rate at which he would be interested?

A. I don't think so at that time. There was a later meeting near the expiration date of September 1st, we had another conference, and he indicated to me that it looked like his present carrier was going to insist upon an increase in premium, and that if we were able to offer him a rate, as I recall it,

(Testimony of Henry R. Cantlen.)

according to my recollection, in the neighborhood of \$1.25, he might be interested in entertaining proposition from us.

Q. Following that conversation or those conversations—withdraw that. Was anything said by Mr. Coughlin with regard to your talking to any insurance company?

A. I don't understand you.

Q. Well, on his behalf, was there anything said of your talking to an insurance company and seeing if you could place his risk?

A. He said he would be possibly interested, and I told him that I would see if we couldn't negotiate a rate with an insurance company that may be attractive to him. [264]

Q. Did you go and talk to an insurance company?

A. Yes. At that time I went to the logical carrier, Fidelity & Casualty Company; the reason for it, they had previously carried Mr. Coughlin and California.

Mr. Eisner: We object to any reasons; entirely incompetent, irrelevant and immaterial. If there are conversations with Mr. Coughlin—

The Court: Well, he can ask what he did. He said he went to Fidelity, and gave his reasons why he went, which, I think, is immaterial.

Mr. St. Clair: I think it is, too, Your Honor.

A. I went to Fidelity & Casualty Company and discussed the possibility of their entertaining the risk.

(Testimony of Henry R. Cantlen.)

Q. (By Mr. St. Clair): They had been on the risk before? A. Yes.

Q. Do you have a memo in that file made at the time of that meeting with Fidelity & Casualty Company? A. Yes, I have.

Q. Is that in your own handwriting?

A. Yes.

Q. Was it made at the time? A. Yes.

Q. And what was the offer, if I may call it that, of Fidelity & Casualty Company, at that time, in regard to carrying Coughlin's risk? [265]

A. As I remember, they offered to write the primary at rates of one per cent—one per cent per \$100.00 of gross receipts. I talked with J. L. Culpepper, who is an agency supervisor for Fidelity & Casualty Company, and he agreed to assume the primary of five and ten thousand, property damage of five thousand, at a rate of one per cent, with the understanding that we would start out at that rating, and from there on the risk would more or less make its own rate, dependent upon the experience.

Q. Where was the excess to be written?

A. We arranged to place the excess with underwriters at Lloyd's. Doing that, we were able to do it cheaper than we can—than we can get Fidelity & Casualty Company on a kind of gross over-all rate for the cover of 1.21.

Q. Did you report that to the officials, to Mr. Coughlin?

A. Yes. It was, according to my file, previous to August 20th, I had a telephone conversation with

(Testimony of Henry R. Cantlen.)

Mr. Coughlin and gave him the proposal, and he gave us the firm order to place the business as of September 1st, 1941.

Q. In that conversation with Coughlin when he gave you the firm order, did you discuss with him the matter of annual adjustment of the rate dependent on the risk experience?

Mr. Eisner: I object to any leading questions, if the Court please. I object to this as leading and suggestive.

The Court: All right, I will sustain it. [266]

Q. (By Mr. St. Clair): Mr. Cantlen, will you tell us what the conversation was, the telephone conversation with Coughlin at the time he gave you the firm order? A. I explained to him——

Q. You have already stated you told him what the proposal was. What did you say to Coughlin?

A. I told him that the Fidelity & Casualty Company was willing to resume the risk at a rate of one per cent for the primary, and that they would go along with the risk and adjust the rate annually, dependent on the loss experience, and we could place the excess at the underwriters at Lloyd's, which would give him a combined rate guaranteed cost of, for that year, of 1.21.

Q. Were policies issued by the F. & C. at that rate and under that understanding?

A. Yes, they were.

Q. Effective September 1st, 1941, is that correct?

A. That is right.

Q. Were there other arrangements to be made

(Testimony of Henry R. Cantlen.)

that were carried out with your office with regard to the starting of this insurance; that is, was there any written authority from California Motor Transport Company to the Fidelity & Casualty Company with regard to this policy and the rate?

A. No.

Q. The policy was issued? Did you have it physically in your possession? [267]

A. Yes.

Q. What did you do with it?

A. I delivered the original to the California Motor Transport Company.

Q. Do you have a daily report of that policy?

A. Yes.

Q. With regard to the question that was asked you about any binders having been issued, is there any indication on the face of that policy with reference to a binder?

A. Yes, the policy shows that there was issued a legal binder No. W-74710.

Q. That binder doesn't show in your files at the moment?

A. No.

Q. Were you handling—I believe you testified you were handling other insurance for Mr. Coughlin in 1946. Were you handling other insurance for him in 1941?

A. Yes.

Q. What was that?

A. I think we had the cargo cover. Yes, the cargo insurance. And we had some miscellaneous covers, some bonds, some safe burglary, and what we call miscellaneous coverages.

(Testimony of Henry R. Cantlen.)

Q. Had you been covering those before September 1st, 1946? A. Yes.

Q. Before this policy was written?

A. This was written in September, 1941. [268]

Q. 1941? I beg your pardon. But you had been Coughlin's broker, then, all the time?

A. No, we had not. Bayly, Martin & Fay—I went to Bayly, Martin & Fay in October, 1940, and Spengler & Johnstone affiliated itself with us as of October 1st, 1940. Spengler & Johnstone had been carrying coverages, or handling insurance, for the account of California Motor Transport Company as far back as I know, as far as 1930.

Q. You had been with Spengler & Johnstone yourself in previous years?

A. I was with them from 1930 to 1935.

Q. On that policy from 1941 to 1942, does Bayly, Martin & Fay show as broker?

A. Yes, they do.

Q. Now I hand you what purports to be a file for the next insured year, and ask you if, prior to September 1st, 1942, you were acting as broker for Mr. Coughlin's companies?

A. Prior to September 1st, 1942?

Q. Yes. A. Yes.

Q. Did you negotiate an insurance contract starting September 1st, 1942? A. Yes.

Q. Was a policy issued for the year 1942 to 1943 by the Fidelity & Casualty Company? [269]

A. Yes.

Q. Was there any change in rate?

(Testimony of Henry R. Cantlen.)

A. No, there wasn't.

Q. Had there been any negotiations prior to its issuance between you and the insurance company?

A. Yes, prior to September 1st, 1942, I again went over the experience—I went over the experience for the first nine months of the year 1941 to 1942, and it was satisfactory to the company on the rate, the extended rate, and they agreed to renew their contract along at the same rate.

Q. And did you, prior to September 1st, 1942, report that to Mr. Coughlin? A. I did.

Q. What did he say?

A. He agreed to continue with the company at the same rate.

Q. Was the policy issued and given to you?

A. Yes, it was.

Q. What did you do with it?

A. Delivered it to the California Motor Transport Company.

Q. I hand you a file that purports to be the Bayly, Martin & Fay file for the year 1943-1944, and ask you if that is a file taken from the files of that company?

A. Yes, it is.

Q. Prior to September 1st, 1943, did you have any conversation with the Fidelity & Casualty Company people with regard to [270] renewal?

A. Yes, I did.

Q. With whom did you have such conversation?

A. With J. L. Culpepper.

Q. What took place at that conversation?

A. We reviewed the experience figures that he

(Testimony of Henry R. Cantlen.)

had, and my recollection as of this year, there were some claims that were boosting the experience, but they were in the form of reserves, and they agreed that the payments were questionable, and I believe they agreed to go along at the same rate.

Q. What do you mean, the payments were questionable?

A. The actual loss payments may be questioned and the company sets up reserves for losses, and I reviewed the figures, the loss figures, and contended that the reserves were excessive; so, in view of the experience of the preceding years, they agreed to go along at the same rate.

Q. Was a policy issued—withdraw that. Did you report that conversation to Mr. Coughlin?

A. Yes.

Q. Where and how?

A. I would always go to this office and discuss the situation with him.

Q. Did you report your conversation with Culpepper in full? A. Yes, I would.

Q. Was a policy issued to Mr. Coughlin's companies, effective [271] September 1st, 1943?

Q. What date was it issued?

A. According to this, on September 3rd, 1943.

Q. Is there any record in the file as to whether there was a binder issued to cover it?

Mr. Eisner: That was from September 1st, 1942, to September 3rd, 1943?

A. No, I don't find that we have a record of a binder.

(Testimony of Henry R. Cantlen.)

Q. Do you have any independent recollection as to whether there was or was not a binder?

A. No, I do not.

Q. During the month of September, 1943, and before the issuance of the policy, were there any negotiations between you and F. & C. with regard to the rate?

A. What was the question again?

Q. During the month of September, 1943, and after the policy was issued, was there any negotiation between you and F. & C. with regard to the rate?

A. After September, 1943?

Q. During September, 1943, and after the issuance of the policy. Well, in the interest of saving time, if Mr. Eisner won't object, was there any change negotiated in the way of handling the excess premium?

A. At one point, yes. The Fidelity & Casualty Company came to us and said that they would like the rate of excess combined [272] with the primary for the same cost that we were paying the underwriters at Lloyd's, in the interest of having a greater premium income to them, which I thought was a sound idea, and so reported to Mr. Coughlin and recommended we combine the cover with Fidelity & Casualty Company, in the interest of giving them a greater premium as against the loss ratio. I can check this, but it was amended as of October 1st, 1943, where the full limit of one hundred and three hundred thousand went and were placed with the Fidelity & Casualty Company.

(Testimony of Henry R. Cantlen.)

Q. I hand you what purports to be a file from your office for the combined years 1944-43 and 1945-46, and ask you if that is a file taken from the files of Bayly, Martin & Fay?

A. Yes, it is.

Q. Prior to September 1st, 1944, were there any negotiations or discussions between either you and F. & C. or between you and the California Motor Transport Company regarding rate or claim analysis?

A. Prior to September, 1944?

Q. I suggest, for your recollection, a letter of August 10th.

A. 1944?

Q. To California Motor Transport.

A. Wait a minute. August 10th, 1944?

Q. Yes.

A. That would be in the previous file, wouldn't it?

Q. Oh, I beg your pardon. [273]

A. I don't seem to find any letter of August 10, 1944.

Q. All right. Do you have any independent recollection of any conversations prior to September 1st, 1944?

A. Yes; Culpepper came to my office with an experience sheet showing the figures, loss figures, on the previous policy and the existing policy.

Q. I believe if you will look at that previous file, Mr. Cantlen, that you had previously, you will find those letters. Anyway, go ahead with the conversation with Culpepper.

A. Well, the risk was running unfavorably.

(Testimony of Henry R. Cantlen.)

Again we reviewed the cases for this renewal period, and my recollection, I think there was some correspondence in connection with it where he agreed to go along and renew at the same rate, pending adjustment of rate on the basis of the ultimate loss settlement figures of these outstanding cases.

Q. Were there any cases you remember in particular?

A. There was a case in Los Angeles, the Brazil case—I think the name of the claimant was Brazil—and they had a considerable amount of money set up in reserve for that case. It was a question of liability. And I took the position that there was no liability on the part of the assured and the reserves were excessive, and ultimately the ultimate payment would be lower than was retained in the reserves.

Q. Did you have any conversation with Mr. Coughlin as a result of this? [274]

A. I did. We keep him advised of his loss experience at all times and of our negotiations with the insurance company.

Q. Was a policy issued for the year 1943-44?

A. Yes.

Q. What was that policy number? Here is the file.

A. SPL-882.

Q. And 1944-45, was there a policy issued as the result of these negotiations?

A. Yes, there was.

Q. What is the date of that policy?

A. The effective date?

(Testimony of Henry R. Cantlen.)

Q. Yes. A. September 1st, 1944.

Q. When was it issued?

A. On August 18, 1944.

Q. Can I refer you to your file, a letter dated August 24, 1944? A. This is 1946—1945.

Q. August 24? A. Yes.

Q. Do you find in your file a carbon of the letter? A. Yes.

Q. May I have it, please? You identify this as a carbon copy of a letter that was in your file?

A. Yes. [275]

Q. Letter addressed to—it is identified by the witness.

Mr. St. Clair: We offer it, Your Honor.

Mr. Eisner: To whom was it written?

Mr. St. Clair: Dated August 24, 1944, addressed to the California Motor Transport. We offer the letter, as identified by the witness——

Mr. Murman: May I see it?

Mr. St. Clair: Oh, I beg your pardon.

(Handing document to Mr. Murman.)

The Clerk: That will be Third Party Defendants' Exhibit DD.

(A Document Was Marked "Third Party Defendants' Exhibit DD.")

Mr. St. Clair: "August 24, 1944. California Motors, Ltd., to J. C. Coughlin."

(Reading Third Party Defendants, Exhibit DD.)

(Testimony of Henry R. Cantlen.)

Q. (By Mr. St. Clair): Now, subsequent to that, did you have any negotiations or correspondence with the F. & C. concerning a follow-up on the claims, Mr. Cantlen, that were mentioned in the letter of August 24th?

A. Yes. On August 10, 1944, I wrote a letter to the California Motor Transport Company.

Q. This is the August 10th letter that we referred to before that you were not able to find in the file? A. Yes.

Q. Subsequent to August 24th, were there any letters exchanged between you and the Fidelity & Casualty Company in regard to [276] these claims, or did you have any conversation, if there were no letters?

A. Well, I wrote a letter on October 12th, 1944, to the Fidelity & Casualty Company, as indicated here.

Q. And you identify this as a carbon of a letter addressed by you to Fidelity & Casualty Company?

A. Yes.

Q. I show you what purports to be a carbon of a letter of December 8, and ask you if that is taken from your files and is a carbon of a letter you wrote to the Fidelity & Casualty Company?

A. Yes.

Mr. St. Clair: The offer is identified by the witness, the letter of October 12th, is offered as Third Party Defendants' exhibit next in order.

(A Document Was Marked "Third Party Defendants' Exhibit EE." in evidence.)

(Testimony of Henry R. Cantlen.)

Mr. St. Clair: We offer the letter of December 8th, as identified by the witness, as our exhibit next in order.

(A Document Was Marked "Third Party Defendants' Exhibit FF," in Evidence.)

Mr. St. Clair: The letter of October 12th, 1944, to Fidelity & Casualty Company, attention Mr. Culpepper——

(Reading Third Party Defendants' Exhibit EE.)

Letter of December 8th, as identified by the witness, [277] addressed to Fidelity & Casualty Company, regarding the same company and policy, under date of October 17——

(Reading Third Party Defendants' Exhibit FF).

Q. (By Mr. St. Clair): Now, with regard to 1945-46 policy, Mr. Cantlen, will you refer to your file, a letter of July 24th, to California Motor Transport Company? A. July 24th?

Q. 1945.

A. 1945? July 24, 1945, to the California Motor Transport?

Q. Do you find such a letter? A. Yes.

Q. Do you find a carbon in your file, and you identify that as a carbon of a letter you wrote to California Motor Transport Company?

A. Yes.

(Testimony of Henry R. Cantlen.)

Q. There is a pencilled notation on the bottom of that letter. Is that in your handwriting?

A. No, it is not.

Mr. St. Clair: May I ask that the letter identified by the witness be admitted in evidence as our exhibit next in order.

(A Document Was Marked "Third Party Defendants' Exhibit GG," in Evidence.)

Mr. St. Clair: That letter reads as follows:

(Reading Third Party Defendants' Exhibit GG.)

Q. (By Mr. St. Clair): About that same time, Mr. Cantlen—— [278]

The Court: Mr. St. Clair, it is twelve o'clock. I think we better take an adjournment until two o'clock now.

(Thereupon, this cause was adjourned to the hour of 2:00 o'clock p.m.) [279]

Afternoon Session, Tuesday, October 11, 1949

HENRY R. CANTLEN

resumed.

Direct Examination
(Continued)

By Mr. St. Clair:

Q. Mr. Cantlen, I show you Exhibit DD, which

(Testimony of Henry R. Cantlen.)

is a letter of August 24, and ask you if preceding that letter there were two letters in the file which are the two you were unable to find this morning?

A. Yes.

Q. You have now located those two letters?

A. Yes.

Mr. St. Clair: I have a series of letters, Your Honor. I have hoped we can stipulate them in. Is it satisfactory to counsel to put these letters in by stipulation?

Mr. Eisner: It is with me.

Mr. Murman: I have no objection.

Mr. St. Clair: We offer them without further identification. I myself took them from the Bayly, Martin & Fay files. Letter dated August 10, 1944.

(A Document Was Marked "Third Party Defendants' Exhibit HH," in Evidence.)

Mr. St. Clair: I offer in evidence a letter dated August 25, 1944.

(A Document Was Marked "Third Party Defendants' Exhibit II," in Evidence.) [280]

Mr. St. Clair: I offer, progressively, separate exhibits next in order, letter of August 2nd, 1945.

(Document Was Marked "Third Party Defendants' Exhibit JJ," in Evidence.)

Mr. St. Clair: August 8, 1945.

(Document Was Marked "Third Party Defendants' Exhibit KK," in Evidence.)

(Testimony of Henry R. Cantlen.)

Mr. St. Clair: August 23rd, 1945.

(Document Was Marked "Third Party Defendants' Exhibit LL," in Evidence.)

Mr. St. Clair: August 24, 1945.

(Document Was Marked "Third Party Defendants' Exhibit MM," in Evidence.)

Mr. St. Clair: Letter of August 10, Exhibit HH, dated October—dated August 10, 1945, addressed to California Motor Transport Company, Mr. J. C. Coughlin.

The Court: That is 1944?

Mr. St. Clair: 1944, Your Honor; thank you. (Reading Third Party Defendants' Exhibit HH.)

The letter of August 23rd, 1944, Exhibit II, is also addressed to the California Motor Transport Company, from Bayly, Martin & Fay, and reads: (Reading Third Party Defendants' Exhibit II.)

Q. (By Mr. St. Clair): Subsequent to that letter of August 24th, Mr. Cantlen, 1944, there was a policy issued for the year [281] 1944-45, is that correct? A. Yes.

Mr. St. Clair: The letter of August 24, 1944, is the one that is keyed to those last two exhibits, Your Honor.

The Court: That is Exhibit DD?

Mr. St. Clair: That is right. The August 2nd, 1945, letter, Exhibit JJ, on the letterhead of Fidelity & Casualty Company of New York, F. L. Anderson, Resident Manager, to Bayly, Martin & Fay, reads:

(Testimony of Henry R. Cantlen.)

(Reading Third Party Defendants' Exhibit JJ.)

Mr. St. Clair: Exhibit KK, August 8, 1945, a letter to the Fidelity & Casualty Company from Bayly, Martin & Fay: (Reading Third Party Defendants' Exhibit KK.)

Mr. St. Clair: The letter of August 23rd, 1945: (Reading Third Party Defendants' Exhibit LL.)

Mr. St. Clair: Carbon of a letter of August 24, 1945, to Fidelity & Casualty Company, Exhibit MM: (Reading Third Party Defendants' Exhibit MM.)

Q. (By Mr. St. Clair): Subsequent to those letters, those last letters, Mr. Cantlen, in August, 1945, was a policy issued for 1945-46? A. Yes.

Q. Do you have any independent recollection, outside of those letters, of any negotiations concerning the rate in that year?

A. I don't recall any, offhand. [282]

Q. Now, prior to September 1st, 1946, there is in evidence a letter, Exhibit AA, dated July 22nd, 1946, to Fidelity & Casualty Company, from you. I hand you that letter, to refresh your memory, and ask you if you recall a conversation with a representative of the Fidelity & Casualty Company concerning this 1946-47 policy along about the date of that letter? A. Well——

The Court: What is that letter? A. AA.

Mr. St. Clair: July 22nd, 1946, Your Honor. This is the start of the 1946-47 period now.

A. Well, looking forward to the renewal date of September 1st, 1946, I was interested in having the claim figures in connection with the policy,

(Testimony of Henry R. Cantlen.)

and we hadn't been given the periodic claim reports, so I talked with Anderson——

Q. Mr. Anderson of Fidelity & Casualty?

A. Mr. Anderson of Fidelity & Casualty—that it was necessary that we be furnished these reports so that we and the assured would be familiar with the claim experience.

Q. Then, subsequent to that letter, did you have—I believe you testified you had a conversation with Mr. O'Malley of Fidelity & Casualty Company concerning the California Motor Transport, and I hand you Exhibit BB, the letter of July 31st, 1946.

A. Well, subsequent to this of July 22nd, I received a [283] telephone call from Mr. O'Malley that he would like to talk to me concerning the renewal of the California Transport Line. I went to his office, and I think he called Mr. Mettalia into that meeting, and he started talking about renewal and what they would have to do, or indicated they would have to have more premium, and so forth, so I reviewed the whole history of the line with them, going back to 1941 when we started dealing with Culpepper, and that the line would be renewed from year to year based upon the experience of it. At that meeting I told them that before we could talk about negotiating for renewal I would want the experience brought up to date on all of the policies back to the inception of—back to September 1st, 1941, the date that the line was written with the Fidelity & Casualty. So, as

(Testimony of Henry R. Cantlen.)

a result of that conversation, I received this communication.

Q. That is the letter of July 31st, is that correct?

A. That is correct.

Q. Thereafter, in Exhibit CC, of August 5th, 1946, you received further information, is that correct?

A. Yes. As of August 5th, I wrote them that we wanted the experience brought up to September 1st, or, rather, that is, right up to date as of August 5th. This experience furnished brought it up to April 1st.

Q. Subsequent to the letter of August 5th, which is Cross-defendant's Exhibit CC, did you have a conference with Mr. [284] O'Malley and Mr. Mettalia?

A. Yes, I did.

Q. Do you have in your file a memo of that made at the time of that conference?

A. I believe I have.

Q. Can you place the date of that conference?

A. Yes; it must have been on August 15th.

Q. And where was it?

A. In Mr. O'Malley's office at the Fidelity & Casualty Company.

Q. Was Mr. Mettalia there? A. Yes.

Q. Did you have with you any of these letters that have been gone into evidence?

A. Yes, I had this letter of July 31st with me, and we reviewed the outstanding cases, and one case in particular was a case known as the Perallto case, on which they had outstanding reserves of

(Testimony of Henry R. Cantlen.)

some \$15,000, so I called for the file on it and the claims man handling the case came in and we reviewed the file, and the claims man felt that there would be no liability, and as a result of that we waded into the experience for \$1,000, figuring there would be no liability there and just would be expense, so that brought the loss ratio down to approximately 122 per cent, and at that meeting they indicated—the Fidelity & Casualty indicated that in view of the carrier increase of 30 per cent that had taken place over all automobile insurance [285] as of January 1st, 1946, and the unfavorable experience that had been seen in the year 1945 to 1946, that they would want approximately a 75 per cent increase in premium, increase over the rate of the former policy, together with writing it, to be used as a standard premium, and that they would only be interested in writing it on a retrospective basis.

Q. At that time, did they give you or did you use, mention, any particular rates, that is, in addition to the 75 per cent increase?

A. Yes, we worked these figures out and used that percentage increase. It brought the standard rate to 2.14. So, from that, and working out the minimum and the maximum, they finally arrived at and said that they would be—they would consider renewing on the basis of a 2 per cent standard for the retrospective and—2 per cent standard for the primary on a retrospective basis, with a one per cent minimum and 3 per cent maximum.

(Testimony of Henry R. Cantlen.)

Q. Are those the figures that are indicated on the memo that you have in front of you that you made at the time? A. Yes.

Q. All right, now, subsequent to that time, you have testified that you, on August 27th, had a conference with Mr. Coughlin, at which time I believe you testified you took the binder to Mr. Coughlin's office? A. Yes. [286]

Q. At that time, where was the—it was in Mr. Coughlin's office. Was Mr. Davis there?

A. At the start of the meeting, no, he wasn't. I think he came into the meeting later on.

Q. Prior to going into this meeting, had you taken these figures from the insurance company and made a memorandum of your own?

A. Yes. Prior to going into Mr. Coughlin's office, in order to explain the function of the retrospective plan and to give him the indicated cost under that plan, I took the receipts for the past year, that is, from September until May, which had been reported to us at that time, and projected them, together with the approximate annual gross revenue, and I have—I did this in my office, took these from my files before going to Mr. Coughlin's office.

Q. Did you have that memorandum with you in Mr. Coughlin's office? A. Yes.

Q. What other memorandum or letters did you have?

A. I probably had the claims reports and I had

(Testimony of Henry R. Cantlen.)

the figures that we worked up at the Fidelity & Casualty Company office.

Q. You had your memorandum of August 15th with you? A. Yes.

Q. And the letter of July 31st, or did you include that? A. What letter is that? July 31st? [287]

Q. That was their answer, this letter, Exhibit BB.

A. Yes.

The Court: A letter in answer to Exhibit AA.

Q. (By Mr. St. Clair): Now, at this conference with Mr. Coughlin on August 27th, Mr. Cantlen, at which time possibly Mr. Davis was there part of the time, what was said and done?

A. I explained to Mr. Coughlin the workings of the retrospective plan, and doing it, I had to make notes in order to illustrate to him the actual cost as it would work out, as the program would work, to him, showing him what his deposit of standard premium was going to be with the rate of 2 per cent times the projected annual gross receipts; what it would be with the minimum application, and what it would be with the maximum application, showing him the various spreads for losses, and explained exactly what his cost would be or could be under this retrospective program.

Q. Do you have in your files any memorandum made of that conversation?

A. Well, I have the pencilled memorandum that I made, explaining the functions and workings of the plan to him.

Q. Was this memorandum made in the presence

(Testimony of Henry R. Cantlen.)

of Mr. Coughlin? A. Yes, it was.

Q. The document which I have just handed you, and which I have just shown to counsel, Mr. Cantlen, is a piece of yellow pad paper with pencilled notations on it. Are those notations [288] the ones you refer to that were made in the presence of Mr. Coughlin?

A. Yes. This was a method of application of the plan.

Q. Of the retrospective plan?

A. That is right.

Mr. St. Clair: We offer the memorandum, as identified by the witness.

Mr. Murman: To which I object on the ground it is purely speculative, assumes facts not in evidence, not binding on the plaintiff.

The Court: Well, I will admit it.

Mr. St. Clair: You may object, but I am talking about a retrospective plan.

Q. Is that where you took a so-called standard rate like 2 per cent, and agreed if the loss ratio at the end of the year is lower than expected it will reduce, the premium will be reduced to one per cent, and if higher it will be increased to 2 per cent?

A. That is right. Use what you call a basic factor, and take losses and combine your losses with the factor, produce your basic, which is your retrospective plan, bring out the minimum, or certain minimum and maximum.

Mr. St. Clair: I will not attempt to read this,

(Testimony of Henry R. Cantlen.)

Your Honor. It is simply the figures described by the witness.

Q. Further at this conference of August 27th, I believe you testified you left the binder with Mr. Coughlin? [289]

A. Yes.

(The Document Was Marked "Third Party Defendants' Exhibit NN," in Evidence.)

Q. (By Mr. St. Clair): I believe you testified—well, go on; tell us what happened at that conference, in regard to what Mr. Coughlin said and his instructions to you.

A. At that meeting, Mr. Coughlin was still not desirous of entering into a retrospective arrangement. He asked me to continue my efforts to get a guaranteed cost plan, either from the Fidelity Company or to see what I could do with the Fidelity Company, or other markets, on a guaranteed cost basis.

Q. And, pursuant to those instructions, did you attempt to find another market for the risk?

A. Yes, I did.

Q. Can you tell what other companies you solicited?

A. Yes. I attempted to interest the Pacific Indemnity Company.

Mr. Murman: I think it is incompetent, irrelevant and immaterial what other companies he may have sought to interest here.

Mr. St. Clair: This is an agent acting under instructions from the principal. I think we are

(Testimony of Henry R. Cantlen.)

entitled to show he carried out the instructions of the principal in an attempt to find another market and couldn't find one.

The Court: I don't see it is particularly material to the case, myself, each company he solicited. I will allow the [290] question just in a general way, that he solicited. He has already said that, a couple of times, he solicited various other companies and couldn't get them to take the risk, is my understanding of the testimony heretofore.

A. That is correct.

Q. (By Mr. St. Clair): You were not able to find another company that would take the risk?

A. That would take the risk at a more attractive basis than the Fidelity & Casualty Company were offering.

Q. Do you know how many companies you solicited, in number, not naming them?

A. Five or six.

Q. You have testified that subsequent to that, and about September 23rd, you had another conference with Mettalia and, I believe, O'Malley. That was the conference at which they insisted upon the retrospective basis, is that correct? A. Yes.

Q. Subsequent to that, as I understand it, you testified that you took, sometime around the end of September or first of October, you went to Mr. Coughlin's office with the retrospective arrangement? A. Yes.

Q. I hand you the retrospective agreement, Defendants' Exhibit C. At this conference at the end

(Testimony of Henry R. Cantlen.)

of September or first of October, did you discuss that retrospective arrangement with [291] Coughlin? A. Yes.

Q. Did you go over it with him page by page or in any other way?

A. I went over there and I went over the factors that were established.

Q. What do you mean by the "factors"?

A. In other words, in here, basically, they state that the premium, the retrospective premium, is to be so much, certain percentage of the standard premium. Conventional factor of loss is established; then this goes on, using the computation. Total retrospective premium would be computed, or the losses are adjusted from time to time, and, in other words, under the retrospective plan it goes on until all losses are finally disposed of under the contract.

Q. In these explanations, were you using these figures you have heretofore testified to of one per cent, 2 per cent, and 3 per cent? A. Yes.

Q. I believe you have testified that Mr. Coughlin still stated he wanted a guaranteed plan, is that correct?

A. Yes. He asked me to leave this with him, that he wanted to look it over and possibly he would want his attorney to look it over, but he was still of the opinion and felt and left the feeling with me that he wanted a guaranteed cost program. [292]

Q. Then you left the retrospective agreement with him?

(Testimony of Henry R. Cantlen.)

A. And I told him that we would make efforts to attempt to secure a guaranteed cost program.

Q. And you did continue such efforts?

A. Yes.

Q. Were you able to get one? A. No.

Q. I refer you to your file and a letter of October 29, 1946. Do you have a letter to the F. & C. in your file of that date?

A. Yes. That was to us.

Mr. St. Clair: I offer in evidence a letter, as identified by the witness, dated October 29, 1946, addressed to the Bayly, Martin & Fay, from the Fidelity & Casualty Company of New York.

(A Document Was Marked "Third Party Defendants' Exhibit OO," in Evidence.)

Mr. St. Clair: This letter, Exhibit OO, dated October 29th, on the letterhead of the Fidelity & Casualty Company of New York: (Reading Third Party Defendants' Exhibit OO.)

Q. Using that exhibit, Mr. Cantlen, did you solicit information on that point from the assured?

A. Yes. Yes, I contacted Mr. Davis by telephone and called this to his attention, and he advised me that the only filing with the ICC was on California Motor Transport Company, Ltd., Docket 15506.

Q. But the letter itself was not sent to Coughlin? [293] A. No.

Q. You have in your file a series of letters around November, 1946, having to do with the

(Testimony of Henry R. Cantlen.)

American Manganese Company. Do you have those before you? A. Yes.

Q. That consists of a letter dated October 23rd from the American Manganese Steel Division to California Motor Transport Company, Ltd.; letter of November 5, from California Motor Transport Company, Ltd., to Spengler & Johnstone, Inc., attention Mr. Henry Cantlen; and letter dated November 18, to American Manganese Steel Division, carbon copy, from California Motor Transport Company, Ltd. Those are the three letters to which you refer as the Manganese? While they are looking at that, Mr. Cantlen, I show you Defendants' Exhibits D, E, F and G, which were marked for identification, which consist of checks of Bayly, Martin & Fay, and in each case two forms attached to the check. Will you identify those, in each case, as coming from your files, and as being from the files of Bayly, Martin & Fay?

A. Yes. This is a copy of the statement form that would accompany the check to the insurance company, and these are——

Q. "These"? That first one——

A. Form 3470, standard form. These two are what we call——

Q. That is, the two unnumbered?

A. We have invoice numbers on them. They are our own office [294] records.

Mr. Murman: Is that part of the exhibit for identification?

Mr. St. Clair: Yes.

(Testimony of Henry R. Cantlen.)

Q. Is that number on all four exhibits, Mr. Cantlen? A. Yes.

Q. You identify them all as such?

A. Yes. This is a copy of our Accounts Payable.

Mr. St. Clair: Mr. Eisner didn't see fit to offer these, Your Honor, so I will offer them. If they may keep that same number, then we won't be confused.

The Clerk: Defendants' Exhibits D, E, F, G, heretofore marked for identification, are admitted in evidence.

(Documents Marked "Defendants' Exhibits D, E, F, and G" Were Offered and Received in Evidence.)

Mr. St. Clair: We offer the three letters, as identified by the witness, as one exhibit, Third Party Defendants' Exhibit next in order.

(Documents Were Marked "Third Party Defendants' Exhibit PP," in Evidence.)

Mr. St. Clair: The letter of October 23rd, 1946, is on the letterhead of American Manganese Steel Division, to California Motor Transport Company, Ltd.: (Reading.)

The letter of November 5th, 1946, is on the letterhead of California Motor Transport Company, Ltd., to Spengler & Johnstone, Inc.: (Reading.) [295]

The letter of November 18, 1946, to American Manganese Steel Division, with a carbon copy to California Motor Transport Company, Ltd., reads: (Reading.)

(Testimony of Henry R. Cantlen.)

The Court: That is signed by——

Mr. St. Clair: Mr. Mettalia—no, Mr. Cantlen; and copy sent to California Motor Transport. It states in there the policy expires September 1st, 1947, in that letter dated October 18, 1946.

Q. Now, after you had left the retrospective agreement with Mr. Coughlin, you continued to try to find a market? On or about November 13th, were you solicited by the Fidelity & Casualty Company concerning the retrospective agreement?

A. Yes, they wrote this letter.

Q. You received this letter which you now hand me? A. Yes.

The Court: What is the date of that letter?

Mr. St. Clair: November 13, 1946. We offer in evidence the letter identified by the witness as next in order.

(A Document Was Marked "Third Party Defendants' Exhibit QQ," in Evidence.)

Mr. St. Clair: This letter is on the letterhead of Fidelity & Casualty Company of New York, addressed to Bayly, Martin & Fay, 114 Sansome Street, re California Motor Transport Policy No. SPL-20968. (Reading.)

Q. On or about the date of this letter, Mr. Cantlen, did you [296] have any telephone or other conference with Mr. Mettalia concerning this retrospective agreement?

A. No, I don't recall any conversation with Mr. Mettalia.

Q. When you received this letter——

(Testimony of Henry R. Cantlen.)

The Court: Who is that Exhibit QQ to? From the plaintiff to Bayly, Martin & Fay?

Mr. St. Clair: Yes, sir.

Q. When you received this letter on November 13 did you discuss it with Mr. Coughlin?

A. Yes. I attempted to get in touch with Mr. Coughlin, and my best recollection, he wasn't available, or I called him and he said he would get in touch with me in a few days, but we were not able to get together. Whether he couldn't see me at that particular time, or he was out of town, or not available, I don't exactly recall.

Q. Then did you receive, on or about December 11th, from the F. & C., a letter? A. Yes.

Q. Is that the letter which you now hand me?

A. Yes.

Mr. St. Clair: We ask that letter dated December 11, 1946, as identified by the witness, be admitted in evidence as next in order.

(The Document Was Marked "Third Party Defendants' Exhibit RR," in Evidence.) [297]

Mr. St. Clair: This letter, Your Honor, reads as follows: (Reading.)

Q. Mr. Cantlen, upon receipt of that letter of December 11th, what did you do, if anything?

A. I contacted Mr. Coughlin. My recollection, it was by telephone. And he told me definitely that he would not enter into the retrospective plan, so then I conveyed the information to the Fidelity & Casualty Company.

Q. To whom there, do you know?

(Testimony of Henry R. Cantlen.)

A. Mr. Anderson, by telephone.

Q. Subsequent to that time, did you have any—withdraw that. Subsequent to that letter, did you make any continued effort to find a market?

A. Yes. There was a thirty-day notice, so we still had time to work on the program, and I continued my efforts in the local market, and also I engaged facilities of our Los Angeles office to see if they couldn't endeavor to secure a market.

Q. Did you advise Mr. Coughlin of that?

A. Yes; I told him I was continuing to attempt to get a market on the guaranteed cost basis on a rate that we felt was commensurate for the risk.

Q. During this period between the time of the notice of cancellation and the actual cancellation of the policy, do you recall any conference in Mr. Coughlin's office, where a gentleman by the name of Simpson was present—some such name? [298]

A. Yes.

The Court: You mean before or after the cancellation?

Mr. St. Clair: After the notice of cancellation and before the cancellation.

Q. Sometime during that month? A. Yes.

Q. Can you place the time of that?

A. Well, it was previous to January 17th. Mr. Coughlin told me he was considering and entertaining the idea of going into the Transport Insurance Exchange.

Q. That is a reciprocal company?

A. Yes. We had considerable talk about it.

(Testimony of Henry R. Cantlen.)

Q. That is, you and Mr. Coughlin? A. Yes.

Q. When and where?

A. In his office. All this was prior to the meeting, after the cancellation had been served and prior to the meeting with Mr. Simpson, and we were interested in assisting Mr. Coughlin. He was our client, and we were duty-bound to help him wherever we could. So he thought it would be advisable——

Q. He said this to you?

A. Yes. He said he would arrange to have Simpson come in, and the three of us would have a meeting.

Q. Who is Simpson?

A. Mr. Simpson is the General Manager for this Transport [299] Insurance Exchange, which Mr. Coughlin was contemplating going into. We held a conference and——

Q. This is the one at sometime prior to January 17?

A. Yes. ——and I asked Mr. Simpson some questions.

Q. Who was there?

A. Mr. Coughlin and myself and Mr. Simpson.

Q. Anyone else?

A. Not to my recollection. And there was some questions that I wanted to ask Mr. Simpson and get an explanation, and I made some recommendations, and subsequently I told Mr. Coughlin there were certain points I wanted to clear in my own mind, and I thought it would be advisable for him

(Testimony of Henry R. Cantlen.)

to have them cleared, so I requested an opinion from our attorney on some of these points concerning the reciprocal company and the obligations of a subscriber, power of attorney, and I forwarded a copy of that to Mr. Coughlin under date of January 18, 1947.

Q. Did you have any subsequent conversations with Mr. Coughlin on this matter, that is, in the next few days, before the cancellation?

A. Yes. On, I would say, the 17th of January, or the 16th, I had a further meeting with Mr. Mettalia, and I asked him if he thought that if I could get a firm order from the assured for a guaranteed cost plan at a rate, would he submit it to New York for their approval. Mr. Mettalia told me he would submit it, but he held little, if any, hope that they would consider it. [300] I then went to Mr. Coughlin's office and asked him if he would give me a firm order at a rate of 1.75, that I would like to submit it on the firm basis to Fidelity & Casualty Company, and at that time he told me that he had subscribed or entered into the agreement with the Transport Insurance Exchange and they were to take over the insurance as of the effective date of the cancellation of the Fidelity & Casualty Company.

Q. There has been testimony that in April of 1947 you received a copy of the final audit, but that you got it from the Fidelity & Casualty Company. Subsequent to receiving that document, which is contained in Plaintiff's Exhibit 13, did

(Testimony of Henry R. Cantlen.)

you have any conversation with the Fidelity & Casualty Company concerning it? A. Yes.

Q. Where was it and with whom was it?

A. That was at the Fidelity & Casualty Company. My first meeting was with Mr. Mettalia, after receiving this final audit statement.

Q. What was said?

A. I objected to the rate charged in this final audit, and contended that the rate of 2 per cent for the primary should not apply at the earned premium because the rate of 2 per cent was only—was to be used in connection with the retrospective agreement, or retrospective agreement basis, and I felt that they were not charging a correct premium in applying the 2.20 [301] rate for the over-all coverage.

Q. What did Mr. Mettalia say?

A. Mr. Mettalia didn't agree. He contended that had the company entertained the business on the guaranteed rate basis, that the rate would have at least been 2.20.

Q. By the way, this insurance that was placed by Mr. Coughlin through Mr. Simpson, were you or your firm brokers on that? A. No.

Q. There is evidence that on July 24, 1947, another statement was issued by the F. & C. on this amount that was due. Did you have any conversations with the F. & C. concerning that?

A. Yes.

Q. With whom was that?

A. I had a further meeting with Mr. Mettalia, and we were—we went over into Mr. Anderson's

(Testimony of Henry R. Cantlen.)

office to review the whole situation again, and I made the same contention, that I did not feel that the insurance company was entitled to use a 2.20 rate basis because that basis was to be used in connection with the retrospective agreement, and that my assured had never agreed to a 2.20 rate on a guaranteed basis, and that in view of the retrospective agreement not having been signed and entered into, that I could not agree with them that they were entitled to a 2.20, which would have been the standard rate under the retrospective plan.

Mr. Murman: What is the date of this statement? [302]

The Court: That was in July of 1947, practically a repetition of what he said. A. That is right.

Mr. St. Clair: Yes. I am trying not to be repetitious, Your Honor.

Q. Then, this letter of August 7th, Exhibit 17, which you transmitted personally, and so forth, and which you testified was delivered on October 22nd, and you testified in some detail as to what was suggested, and the letter of October 22nd, which was Exhibit 18—after you had this letter of October 22nd, did you use it again, or use it with the insurance company?

A. Yes. I had a further meeting with Mr. Anderson. I think Mr. Mettalia was there. Mr. Anderson, after that meeting, said he would take the thing under consideration and would advise me of his findings.

Q. And that letter is already in evidence, saying

(Testimony of Henry R. Cantlen.)

that they would not change their position?

A. Yes. No, here it is here.

Mr. Murman: I think there is a quotation from it.

A. The quotation is incorporated, but there it is.

Mr. Murman: It is quoted in Plaintiff's Exhibit 19, I think, Your Honor.

Mr. St. Clair: There is no use burdening the record with the exhibit, as long as it is quoted.

Q. Why did you not deliver the letter of August 7, 1947, Exhibit [303] 17, until October 22nd, 1947?

A. Well, I was still going back and forth with the Fidelity & Casualty Company, and I had really hoped to work out a compromise rate at which the thing may be compromised, or which I felt might be an equitable rate to suggest to my client to pay.

Q. You testified previously it was your practice to turn clients' money over to the insurance company the next month after you received it. The evidence showed you received the premium for September, 1946, in November, 1946, but did not turn it over to the insurance company until January, 1947, apparently a lapse of a month from your standard practice. Do you have any explanation of that?

A. Yes. I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up because the transaction had not been completed, as far as we were concerned; there was no agreement; the assured had not consented or

(Testimony of Henry R. Cantlen.)

agreed to the retrospective basis on which the company was insisting, and so I felt that it was still an unsettled problem, and, to my best recollection, I told her just to hold that temporarily.

Q. Were you asked on direct examination, when someone else called you as a witness, as to why you didn't deliver the policy to Mr. Coughlin when you received it in October, 1946?

A. I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective [304] agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned.

Mr. St. Clair: That is all the questions I have at this time, Your Honor, from this witness.

The Court: Maybe the reporter needs a little rest. We will recess for five minutes.

(Thereupon, a short recess was taken.)

Mr. St. Clair: We have finished with this witness, Your Honor.

Cross-Examination

By Mr. Eisner:

Q. The questions I asked before and you objected to because they were not proper cross-examination of your witness, I may ask now.

Q. Mr. Cantlen, did you make any endeavor to

(Testimony of Henry R. Cantlen.)

collect the deposit premiums called for by Policies 20950 and 20968?

Mr. Murman: To which I object, as I have heretofore, that as far as the plaintiff is concerned it is all incompetent, irrelevant and immaterial, not within the issues of this case.

The Court: Overruled.

A. No, I did not.

Q. (By Mr. Eisner): Did Bayly, Martin & Fay receive any bill from Fidelity & Casualty Company for this—for these deposit premiums under these policies? [305]

Mr. Murman: Same objection. May my objection run to all this line of testimony, Your Honor?

The Court: Yes.

A. They may. They usually send a short statement with the policies, Mr. Eisner. Whether they did or not in this instance, I can't actually remember; but if they did, we would ignore them, because we do our billing from the policies themselves, not from any statement.

Q. Have you any recollection, Mr. Cantlen, at any time, of Fidelity & Casualty Company having asked or demanded the deposit premiums from Bayly, Martin & Fay? A. No, they did not.

Q. Or made any inquiry of Bayly, Martin & Fay whether or not Bayly, Martin & Fay had collected the deposit premium from the insured?

A. No, they did not.

Q. Calling your attention to Exhibit DD, that is, a letter addressed to California Motor Transport

(Testimony of Henry R. Cantlen.)

Company on August 24, 1944, with reference to the policy that would become effective on September 1st, 1944, is that correct? A. That is correct.

Q. And on August 24, 1944, prior to the time of the expiration of the policy then in effect, you forwarded to California Motor Transport Company the new policy for the succeeding year with your letter of August 24, 1944, is that correct? [306]

A. I sent the renewal policy with this letter of August 24th.

Q. That is right, you sent the renewal policy with your letter of August 24th, 1944.

A. Correct.

Q. In this same letter of August 24th, 1944, in which you enclosed the renewal policy, you also enclosed your invoice for the deposit premium under the policy that would become effective on September 1st, 1944, did you not?

A. That is correct.

Q. And you state in this letter a remittance in due course would be appreciated?

A. That is right.

Q. Was this letter, the practice followed in 1944, the same practice you had been following in collection of deposit premiums in other instances?

A. Yes, sir.

The Court: He has testified to that before.

Mr. Eisner: I think that is all, if Your Honor please.

(Testimony of Henry R. Cantlen.)

Cross-Examination

By Mr. Murman:

Q. Mr. Cantlen, you mentioned, in answer to a question put to you by Mr. St. Clair, some discussion about the Peralta case in a conference on August 15, 1944, in Mr. O'Malley's office. Do you remember that remark? A. Yes.

Q. If I remember your testimony correctly, the discussion, [307] there was around \$15,000 reserve at that time, and it was reduced to \$1,000, following which there was a figuring of the premium that would be considered in connection with renewal, and it was then you talked about the retrospective agreement 1, 2, and 3 arrangement, is that right?

A. Well, you are pretty well mixed up.

Q. Didn't those things take place at that conference?

A. Yes, but you haven't got it straight.

Q. All right, you tell me.

The Court: I think the court has it straight.

A. It is in the record.

The Court: He called on the claims man and they discussed the Peralta case, \$15,000, and decided to reduce that to approximately \$1,000 because there wasn't any liability, and so reducing it, they then raised the tentative figure.

Mr. Murman: And the loss ratio was then figured at 185 per cent.

The Court: Yes.

Q. (By Mr. Murman): Going forward to the

(Testimony of Henry R. Cantlen.)

time you talked with Mr. Mettalia in January, 1947, regarding guaranteed cost basis——

A. Yes.

Q. ——didn't Mr. Mettalia at that time tell you about the disposition of the Paralta case?

The Court: When was that?

Mr. Murman: In January, 1947, Your Honor.

A. No, I don't think so.

Q. (By Mr. Murman): Did he subsequently tell you about the disposition of the Peralta case?

A. Yes.

Q. When did he tell you about that, according to your best recollection?

A. I don't know when it was, but it was after it was disposed of, whatever that date was, or after the trial of it. I don't recall the date.

Q. It was during this time following the cancellation of the policy and the discussions concerning the final audit and the payment of premiums, and so on?

A. That is true, it was in that interim period that that case was disposed of.

Q. Did he tell you that——

The Court: What period is that between?

Mr. Murman: Following the cancellation of the policy, Your Honor, and during the period of final audit discussions and the discussions concerning the premium rate.

Q. Isn't that right, Mr. Cantlen?

A. Yes, it was after the cancellation took effect

(Testimony of Henry R. Cantlen.)

and between January 19th and, let's say, August, somewhere in that period.

Q. Yes. Of 1947? A. That is right.

Q. Did he tell you that the defendants had had a judgment against [309] them for \$71,000 in that case? A. Yes.

Q. Did he also tell you that under those conditions they couldn't possibly consider a renewal at any less than the rate they had previously discussed with you?

A. The thing was all over then.

Q. But I mean, you were trying to work out a compromise at that time?

A. Yes, we were trying to work out a compromise rate at that time, but I don't see that that had any bearing on the earned premium.

Q. Going back to the first policy that was issued, where you had Lloyd's on the excess, I believe you testified the total premium was 1.21, including the excess?

A. The totals, yes. 1.221, wasn't it?

Q. 1.21 I have in my notes.

The Court: I have 1.21.

A. I think it is 1.21.

Q. (By Mr. Murman): Anyway, Mr. Cantlen, when the F. & C. took over both primary and the excess, I think you said it was on the renewal of the 1947 contract?

A. No, it was as of October 1st, I think, 1943, and the correct over-all rate was 1.21, but waiving the tax factor on your London premium, which you

(Testimony of Henry R. Cantlen.)

have to add on, and a rate of 1.23 with F. & C. was comparable to 1.21, plus your taxes. [310]

Q. I see. Actually, it was about the same, with the tax? A. Yes, over-all cost.

Mr. Murman: I have no further questions.

Mr. Eisner: Nothing further.

Mr. St. Clair: Nothing on redirect examination, Your Honor.

(Witness excused.)

Mr. Eisner: Are you resting, Mr. St. Clair?

Mr. St. Clair: Yes. [311]

Note

[Note: Pages 312-326, covering testimony of James C. Coughlin given on Oct. 11, 1949, inadvertently omitted from this place is set forth in the Supplemental Transcript of Record on pages 399 to 413.]

JAMES C. COUGHLIN

resumed.

Cross-Examination

(Continued)

The Court: Mr. Coughlin was on the stand and being cross-examined by Mr. Murman.

Mr. Murman: I think I had completed my cross-examination. Mr. St. Clair, I believe, has some questions.

By Mr. St. Clair:

Q. Mr. Coughlin, did I understand that you had been President of the defendant since 1930, or somewhere in that region? A. Yes.

(Testimony of James C. Coughlin.)

Q. And are you an owner? I mean, do you own companies or part of them? A. Yes, I do.

Q. Have you been in that position during all since 1930? A. I would say yes.

Q. During that period of time, have you handled the insurance for these companies which are the defendants here? A. Yes.

Q. You testified that the gross receipts, rather, gross premiums, were thirty or forty thousand dollars a year, I believe?

A. That is just approximate.

Q. Yes. Have these been substantial during all these years, [327] these insurance premiums; that is, have they been large sums?

A. I would say they varied, due to the gross receipts, of course.

Q. You will recall you testified that Mr. Cantlen, around August 27th, delivered to you a binder, copy of which I now hand you, Defendants' Exhibit B, your own exhibit. Do you recall that testimony on your part?

A. Yes, I do. He handed me this, together with a letter.

Q. That is correct. At that time, did you read this document which you now have in your hand—copy of which you now have in your hand?

A. No, sir.

Q. You had been handling insurance for a long period of time? A. Yes, sir.

Q. Do you know what a binder is?

A. Well, I do and I don't, I suppose.

(Testimony of James C. Coughlin.)

Q. In any event, you did not read that document which you have in your hand?

A. I did not, but I do know a binder gives you coverage until a policy is issued.

Mr. St. Clair: I move to strike that answer as unresponsive and a conclusion.

Mr. Murman: You have asked for it.

The Court: I can't do that, because you asked him.

Mr. St. Clair: All right. [328]

Q. Mr. Coughlin, did you turn the binder over to anyone in your organization?

A. Mr. Davis, yes.

Q. Did Mr. Davis make any kind of report on it to you? A. No, sir.

Q. Just so that I may understand it correctly, you proceeded on the understanding that the old policy SPL-1457 was continued in existence by this binder, is that correct?

A. That is correct. In fact, I asked, at that particular time, when the binder was given me, of Mr. Cantlen if there was going to be any additional charge for that binder, and he said no, that he has an arrangement with F. & C. to carry that under the old rate during negotiations.

Q. Yes, and for how long?

A. Didn't mention a period of time.

Q. And you didn't ask him?

A. No, sir. During the negotiations, he mentioned, yes.

Q. You relied on that? A. I did.

(Testimony of James C. Coughlin.)

Q. You didn't read that written document?

A. No, sir.

Q. You didn't personally know it stated on its face what it was good for? A. No, sir.

Q. Do you know now, as you sit there? [329]

A. No, sir, I do not.

Q. Would you take my word for it, it says sixty days, it is good for sixty days.

A. If you say so, yes.

Q. At the end of sixty days, did you instruct Mr. Cantlen to make any attempt to extend this binder?

A. No, sir. When he came up, he stated then he was still negotiating with F. & C.

Q. Do I understand it is necessary in your business for you to have insurance, that is, necessary by reason of the rules of the ICC and Public Utilities Commission? A. Yes.

Q. And also, I assume, without insurance, you risk catastrophe, that is accidents. You were aware of that risk, I assume?

A. Yes, indeed, but we had no trouble placing insurance.

Q. I just want to be sure I understand this. So that you didn't read the binder, didn't know how long it extended, and that you took some verbal statement from Mr. Cantlen that 1457 was continued indefinitely?

A. I read it slightly, yes, that accompanied with this binder.

Q. Well, you were satisfied, as a business man, to rely on its wording, is that right?

(Testimony of James C. Coughlin.)

A. Well, I think so, and also what Mr. Cantlen did tell me at the same time.

Q. Are you familiar with the fact that certain of the customers [330] or clients, or whatever you call them, that you serve, require certificates showing you are insured? You are familiar with that fact, are you?

A. Yes, I am.

Q. I hand you Third Party Defendants' Exhibit PP, letter November 18, 1946, with reference to the American Manganese Steel Division, certificate of insurance. You observe that is a letter to the American Manganese Steel Division?

A. Yes.

Q. Attached to it is a letter from you.

The Court: That is Exhibit what?

Mr. St. Clair: Exhibit PP, Your Honor.

A. Yes.

Q. I will refer you to the letter, a carbon of which went to the California Motor Transport Company, Ltd., and call your attention to the fact that the statement in there is that your insurance expired September 1st, 1947. Do you see that statement in the letter?

A. Yes, I do. I didn't receive this letter.

Q. Did anyone in your organization?

A. I suppose Mr. Davis did. I didn't receive it.

Q. Did Mr. Davis call this letter to your attention?

A. Not that I recall.

Q. Was it your routine in details of insurance, is Mr. Davis the man that would do that insurance business? [331]

A. Majority, yes.

Q. Though you had handled the broad company policy?

A. Yes.

(Testimony of James C. Coughlin.)

Q. Mr. Davis didn't call your attention to this remark that your insurance ran out September 1st, 1947? A. Not to my knowledge, no.

Q. Would you think that would have been within his duties to call that to your attention? When I ask you that, I don't want to trap you. I call your attention that this is after the sixty days.

Mr. Eisner: I think it is entirely incompetent, irrelevant and immaterial, if the Court please, whether or not it would have been within the duties of Mr. Davis. It calls for a conclusion of the witness.

The Court: I don't think so. I will allow the question.

A. Perhaps he didn't notice the answer. As I say, it is just a matter of routine. They send it to you, you send it to the insurance company.

Q. That is, within your company, it was just a matter of routine whether you had insurance or not?

A. Oh, no, indeed not.

Q. Was Mr. Davis acting under your direction and control during this period of time?

A. He does, yes. [332]

Q. You testified, Mr. Coughlin, that sometime prior to, I believe, July, 1946, you discussed with someone named Simpson the matter of the possible insurance in the Transport Insurance Exchange, is that correct? Is that your testimony?

A. That is right.

Q. At that time, were you familiar with the method of operation of an inter-insurance exchange such as the one in question?

(Testimony of James C. Coughlin.)

A. Somewhat, yes.

Q. Were you shown the actual type of document you were required to sign? Were you shown those in July, 1946?

A. No, sir.

Q. But you understood how the reciprocal worked in general?

A. In general. Some of the other carriers, prior to our joining up with this particular company, had insurance with them, yes.

Q. You discussed it with your fellow carrier friends?

A. Yes, and attorneys, that is right.

Q. And—it is jumping ahead of myself a little—were you familiar with the fact that in this particular inter-insurance exchange you were required to sign a side agreement, as it were, with regard to how you fix the amount of premium?

A. Well, I knew there was a difference between the payment.

Q. Did you know you had to sign an agreement besides the [333] policy in which it was decided how the premium would be fixed?

A. I believe I signed it, yes.

Q. But you knew that in July, didn't you, that you would have to do that?

A. No, I didn't.

Q. When did you first learn of that?

A. After the cancellation in December of 1947, I told Mr. Cantlen I was going to put it in the hands of the Truck Transport Exchange.

Q. I show you your own Defendants' Exhibit "C," Mr. Coughlin, which is the retrospective agree-

(Testimony of James C. Coughlin.)

ment, hand that document to you and I understand from your previous testimony that you stated Mr. Cantlen came to your office with that document and some other papers and——

Mr. Eisner: Just a moment, I don't think there were any other papers.

Mr. St. Clair: Well, I believe he testified there were some other papers. If you would like me to, I will confront him with his testimony. Well, I take it back.

Q. Were there any other papers in Mr. Cantlen's possession at the time he handed you this retrospective agreement? A. Not to my knowledge.

Q. And what was the conversation with regard to that retrospective agreement that you have in your possession now? [334]

A. Mr. Cantlen went on to explain the workings of this retrospective agreement—I never heard of those before, never knew what it meant—and as he was going through it, I said, “Why, Henry, give me the substance of it, what is it costing the company in dollars and cents?” “Well,” he said, “Jim, it will cost your company \$26,000.00 total.” I said, “Is that regardless of our loss ratio?” He said, “Yes, the company has to have a net \$26,000.00, and could cost you a maximum of \$80,000.00.” So, I said, “Henry, the cost of the insurance now is around \$30,000.00. For \$4,000.00, how could I subject our company to a loss of \$50,000.00 more?” I said, “I can't accept the retrospective policy.” He said, “All right, Jim, I am still negotiating with the F. & C.”

(Testimony of James C. Coughlin.)

Q. What in general were your gross receipts at that time? A. I don't recall.

Q. Would you repudiate the suggestion from another witness that it was around \$1,700,000.00 a year?

A. No, sir.

Q. Would that be approximately right?

A. I wouldn't know.

Q. Who would know? A. Mr. Davis.

Mr. St. Clair: Is he going on the stand?

Mr. Eisner: Yes. [335]

Q. (By Mr. St. Clair): He will be able to tell me that fact? A. He should.

Q. You don't know what your approximate gross revenue was?

A. Not off-hand. Our gross receipts have been varying each year.

Q. I hand you Third Party Defendants' Exhibit "NN," and in order to refresh your memory, in case you didn't hear the testimony, Mr. Cantlen testified he had that document with him—made that document on your desk at the time he explained, or attempted to explain the retrospective agreement to you. Do you have any independent recollection as to whether Mr. Cantlen made any notations in front of you?

A. At times when Henry comes up, he would be across the desk. I wouldn't see the figures. Perhaps when I asked him, "How does this work in dollars and cents to the company?" Perhaps in his memorandum he may have worked it out, but I didn't see the figures. He may have worked it out for the purpose of telling me the minimum and maximum.

(Testimony of James C. Coughlin.)

The Court: What is the number of that Exhibit?

Mr. St. Clair: It is Exhibit "NN."

A. I don't remember seeing the Exhibit itself, no, sir.

Q. (By Mr. St. Clair): But you wouldn't say it wasn't made?

A. I wouldn't say that, but I never saw it.

Q. But did you know at that time, or do you recall Mr. Cantlen [336] explaining to you the maximum of \$3.00 a hundred?

A. No, sir, nothing mentioned as far as dollars other than the \$26,000.00 and \$80,000.00.

Q. I am interested in this \$80,000.00. Just how do you suppose that was arrived at?

A. As I say, I wouldn't know.

Q. Would you care to make a computation as to what three percent times your gross receipts would be?

A. No, sir.

Q. You have made no such computation?

A. No, sir. Whatever he did, I told him I wasn't satisfied—the retrospective agreement was not satisfactory to me, and I made no bones about it.

Q. He showed it to you, didn't he? He handed you Defendants' Exhibit "C"?

A. He had it. I saw it.

Q. He left it with you, didn't he?

A. Yes, right on my desk.

Q. As you say, he attempted to explain to you, or explained to you, how it worked?

A. I asked him. He was explaining it, yes, and I asked him, "Henry, that is all Greek to me." I said,

(Testimony of James C. Coughlin.)

“Tell me what it costs our company in dollars and cents.”

Q. Now, Mr. Coughlin, I call your attention to the first page of that document that was handed you at the time, and [337] observe that it refers to a particular policy number SPL 20968. Did you observe that at that time?

A. No, sir, never observed at any time. In fact, I never read it all the time it was in my office.

Q. You never read the agreement?

A. No, sir.

Q. Did you turn this over to anyone in your organization? A. No, sir.

Q. Did Mr. Davis see this document?

A. No, sir.

Q. So that it never got out of your possession?

A. That is right.

Q. You never read it? A. That is right.

Q. Never noticed it had the new policy number 20968 on it? A. No, sir.

Q. You took no interest in it at all?

A. I didn't want it. Why should I take an interest in it?

Q. And you didn't inquire whether you were covered in the binder?

A. I know I was told I was covered in the binder on August 27th.

Q. At my request, your counsel furnished me three or four documents—which I have never seen until this moment, Your Honor—which purport to

(Testimony of James C. Coughlin.)

be the policy issued by the [338] Transport Exchange.

Mr. St. Clair: If I may be permitted a second?

The Court: Do you want to take a recess, Mr. St. Clair?

Mr. St. Clair: No, I am just looking for one document, Your Honor. It will take me just a moment.

Q. I hand you these documents, that your counsel just gave me, and ask you if you are able to tell me whether or not these are all the documents that were signed by you or by the Transport Exchange? Well, your counsel now has handed me—obviously those are not all of them. I hand you another document entitled, “Profit Sharing and Premium Determination Agreement,” and ask you if you have ever seen that document before? A. Yes.

Q. And was that signed by you on behalf of the Defendants here? A. Yes.

Mr. St. Clair: I ask that this “Profit Sharing and Premium Allowance Agreement,” with those things, those Addendum “1” and Addendum “2,” as identified by the witness, go in evidence as Third Party Defendants’ Exhibit next in order.

Mr. Eisner: We will object, if the Court please, that this is incompetent, irrelevant and immaterial for this reason, [339] that the only materiality that I can find and the reason, in the insurance that was placed by the California Motor Transport Company—I asked Mr. Coughlin was he in a position and did he have an agreement he could place with the Insurance Exchange, this insurance at the same rate prior

(Testimony of James C. Coughlin.)

to the time and at the time that the original insurance expired.

Mr. St. Clair: If you are arguing the question before you put the question to the witness——

Mr. Eisner: I am not putting a question, I am arguing my objection.

Mr. St. Clair: The reason I am offering it, this witness deliberately testified he could get insurance at this same rate. I want to show in a reciprocal that you can't possibly know what the rate is. It is impeaching the witness.

The Court: He testified, as I recall it, that up to the time the binder was issued, he could get insurance at the same rate, and that at even up to the time of the cancellation, he could get insurance at a few cents more.

Mr. St. Clair: That is correct.

Mr. Eisner: Substantially, yes. The insurance he could get at the same rates was at the time the binder was issued, and at the time the original insurance expired, and that, in my opinion, is the only period.

The Court: He went further than that and said at the time, Mr. Eisner, the insurance was cancelled, he could get [340] it at a few cents more, that he went to Simpson and Simpson told him he could get it at a few cents more.

Mr. St. Clair: That is exactly correct.

Mr. Eisner: That is substantially correct.

Mr. St. Clair: Is it admitted in evidence?

The Court: Yes.

(Testimony of James C. Coughlin.)

(A document was marked Third Party Defendants' Exhibit No. "SS" in evidence.)

Mr. St. Clair: As a matter of fact, I suspect I better enter them all as Exhibit No. "SS." They are all part of the same transaction.

The Clerk: I will mark this "SS-1" then.

Q. (By Mr. St. Clair): This document, Mr. Coughlin, is entitled, "Power of Attorney," and I ask you if that is your signature on there, and if you signed that? A. It is.

Mr. St. Clair: We offer this as Third Party Defendants' Exhibit "SS-2."

(Document was marked Third Party Defendants' Exhibit "SS-2" in evidence.)

Q. (By Mr. St. Clair): I show you what purports to be a document, original of Policy 28-001, and ask you if that was the policy issued in connection with the profit-sharing and premium determination agreement and power of attorney?

Mr. St. Clair: Do you want to stipulate these in, Mr. [341] Eisner?

Mr. Eisner: Yes, they are identified. They are offered as one Exhibit, I take it?

Mr. St. Clair: We offer that——

Mr. Murman: They are all "SS."

Mr. St. Clair: We offer that as "SS-3" and what apparently is some sort of excess, shows a small premium, as "SS-4."

The Court: Received.

(Documents were marked Third Party De-

(Testimony of James C. Coughlin.)

Defendants' Exhibits "SS-3" and "SS-4" in evidence.)

Q. (By Mr. St. Clair): Are you familiar with those documents? Do you know how the premium is determined under it?

A. Well, to a certain extent, that the maximum we could get stuck for is one month's premium.

Q. That is your interpretation of it, any way?

A. Yes.

Q. That is what you say these mean, do you?

A. That is right.

The Court: That means that you considered that this policy could be cancelled at the end of any month?

A. No, that was in case of cancellation, we couldn't lose anything, but might our company go broke or something, the best we could be stuck for is one month's premium, but there had to be bankruptcy in the company, I believe, before that [342] could happen.

Q. Yes, but as far as the accidents, day by day accidents, if we may call it that, under this premium determination agreement, do you understand you pay for those losses plus 13 per cent?

Mr. Eisner: Just a moment. I think those documents speak for themselves, if the Court please. I don't think it is proper to argue with the witness about the contents of the document.

Mr. St. Clair: Withdraw the question.

Q. I show you, Mr. Coughlin, page 2 of Defendants' Exhibit "SS-1," and ask you if you read that page before you signed the agreement?

(Testimony of James C. Coughlin.)

Mr. Eisner: Just a moment, Mr. St. Clair, that page you are showing the witness, just to show the unfairness of trying to read one document without—it is governed and controlled by a page of the policy itself, which is another part of this Exhibit, they being parts of one transaction, and which limits specifically any liability for premium in addition to the premium that is specified, to a maximum of the deposit premium, and the deposit premium is a total of \$2,500.00 under one policy, which is the primary policy, and \$500.00 under the other policy, which is the excess, so that the maximum, while there is an opportunity for dividend in the case of premium, the earned premium should be less than [343] the premium that was paid. The maximum of liability in the event of cancellation of the insurance by the insured would be the deposit premium.

Mr. St. Clair: Mr. Eisner has given an argument of the points I can't let go unchallenged. As I am one of the few attorneys in the State that had to go through the California Hawaian Indemnity Exchange matter, I know what I am talking about. I know the liability that would ensue if the Exchange went broke. I am talking about the rate. He has been testifying about the rate all along, and I am asking him, not what his liability was if the Exchange went broke, but what his rate, what he had to pay, and the page I showed him, page 2 of that document, fixes the rate.

Mr. Eisner: I must admit I haven't had the experience you have had nor am I an expert in this

(Testimony of James C. Coughlin.)

matter, but I have read the agreement, and I did so in conjunction with the policy, and while I may be in error, it is my opinion, and I have so stated to the witness, the maximum liability would be the deposit. I think if I show it to you, I am inclined to think you will agree with me.

Mr. St. Clair: All right, the witness has been put on the Q.T. I press my question. I only asked him if he read it before he signed it. Isn't that a proper question?

Mr. Eisner: I have no objection. If that is the question, I withdraw my objection. I am not objecting to that [344] question.

The Court: Of course, if he is like I am with my insurance policies, I have never read one.

Mr. Eisner: I haven't either.

Mr. St. Clair: Yes, but you are not an expert, Your Honor, while he is.

Mr. Eisner: Oh, no, you are the only one that qualified as an expert.

The Court: It has been my experience, lawyers take out insurance policies, unless they are insurance experts, they never read them.

Mr. Eisner: I never read one.

The Court: I don't know whether insurance lawyers read the policy.

Mr. Eisner: In other words, this witness testified all his negotiations were in connection with the insurance as to rates of premium and the details are left to Mr. Davis.

(Testimony of James C. Coughlin.)

Mr. St. Clair: If that page 2 is a detail, I don't understand my English very well.

Q. Mr. Coughlin, do you recall reading that page before you signed the premium determination agreement?

A. Oh, no doubt I have, but again, on the other hand——

Q. What did you say, "Yes, you have read it"?

A. No doubt I have, yes.

The Court: What does that call for? [345]

Mr. St. Clair: I am just about to read it to Your Honor. Section 2 of Exhibit "S-something":

"The premium shall be subject to the following profit-sharing formula and all or part of the premium paid in excess of the earned premium shall be subject to adjustment and returned to the insured in accordance with the results obtained by the application of the following profit-sharing formula: Formula for determining earned premium. Charges:

"1. Incurred Losses and Loss Expense, plus

"2. Thirteen percent (13%) of the premium paid for Home Office Overhead Expense and contribution policy-holders' surplus, plus

"3. Taxes paid by the Exchange, plus

"4. The deficit, if any, from previous accounting period or periods.

"5. Commissions Paid."

Mr. Eisner: Is that all you are reading?

Mr. St. Clair: That is all.

Mr. Eisner: Inasmuch as counsel has read a part of that Exhibit, and it is our part of one Exhibit, I

(Testimony of James C. Coughlin.)

would like to read the last sentence of Exhibit "SS-4," which refers to the premium: "The maximum liability of the subscribers shall not exceed an additional amount equal to the premium deposit provided for the insurance obtained." Now, then——

Mr. St. Clair: No occasion for this. We can argue [346] that in our brief.

Mr. Eisner: You are reading a part of the Exhibit and I am reading another part. I am not arguing it.

The Court: I would like to ask Mr. St. Clair if he knows just what that language meant in layman's terms, that language in that agreement that you just read? In other words, what is the arithmetic of it?

Mr. St. Clair: The arithmetic is, you take your losses, Your Honor, the actual losses paid out, plus 13% for overhead.

The Court: You mean losses of a particular subscriber?

Mr. St. Clair: Yes. Each is a separate accounting problem. You take your losses plus your 13% and plus the taxes and probably—it, in fact, is only 5 and 10%, any re-insurance above that, so that means that the member of an Exchange is so insured to 5 and 10, Five Thousand and Ten Thousand, plus 13%, and, I understand, plus taxes and so forth. That is actually what that means, and if he has a catastrophe—one catastrophe, he doesn't get hurt too much, because he only pays on 5 and 10, but if he has a series of accidents that are around 5 and 10, he has to pay them. That is what it boils down to.

(Testimony of James C. Coughlin.)

The Court: What does that boil down to, a percentage premium?

Mr. St. Clair: Because it is 5 and 10, you mean, only? [347]

The Court: Well, here you have a percentage of premium he says he was paying, or was to pay, 1.223, I think, and the other side claims it is 2.20. How does this boil down into figures? Just estimate it.

Mr. St. Clair: There is no answer to that until we see their loss experience, because he has promised to pay the first 5 and 10 of the losses during the year himself, plus 13%, without any maximum or minimum, while the F. & C. offer him a minimum of one percent and maximum three percent, whereas under the re-insurance Exchange, where he is a member of the Exchange, there is no limit.

The Court: Maybe Mr. Coughlin is learning something he never knew before.

Mr. St. Clair: Maybe he is.

Mr. Eisner: I would like to state what I understand these documents to mean. Of course, I may not have the weight you have, from your experience. This contemplates a continuation of the insurance with this Exchange from year to year. At the expiration of each year a calculation is made of the earned premium and the premium paid, the earned premium being calculated as stated by Mr. St. Clair; then if the earned premium should be less than the premium paid, a dividend is paid to the subscribed or to the insured. In the event that the earned premium should be more than the premium paid, than the ex-

(Testimony of James C. Coughlin.)

cess is carried as a matter of record, [348] that is, these same figures that Mr. St. Clair has given, so that there will be no dividend paid to the insured in subsequent years until that deficit is made up or covered by the earned—by the premium that has been paid. But in the event that the insured should cancel the insurance, then if there should be a deficit remaining, the insured is liable for that deficit, but he is not liable for any deficit in excess, as stated in the policy itself, which is a part of the transaction, of the maximum liability, but is limited to the deposit premium made not only under the policy—which in the case of one policy, the primary policy here, was \$2500.00, and in the case of the other \$500.00, meaning \$3,000.00—but the maximum of liability in addition to the premium called for by the policy itself. Now, that is the way, from my readings and study of these Exhibits, I interpret them and understand them, what I understand them to mean.

Mr. St. Clair: Apparently, this is all opinion, but in any event, I have made the point it isn't a fixed premium he got from the Transport Exchange. It was a variable premium. That is all I was after any way.

Q. Did you hear some testimony one of these insurance company's witnesses about one loss while the policy was in existence of \$71,000.00, or some large figure like that? Are you aware of that?

A. No, I didn't hear the figure. [349]

Mr. Murman: I think that was a question I put to Mr. Coughlin in connection with the claims that we received.

(Testimony of James C. Coughlin.)

The Court: That was the Peralta case.

Mr. St. Clair: Yes, Your Honor. I was only interested from Mr. Coughlin how he got this \$81,000.00 a year that he has testified Mr. Coughlin told him he might have to pay under a F. & C. policy.

Q. You have no further recollection on that point, Mr. Coughlin, as to how Mr. Cantlen could arrive at \$81,000.00? A. No.

The Court: Wasn't that where Mr. Cantlen and somebody from the insurance company called the claims agent in and he thought he would win that case for \$1,000.00?

Mr. Murman: Yes. It was originally reserved at \$15,000.00, then they cut the reserve down to \$1,000.00, and the jury out-guessed them.

Mr. St. Clair: Also, Mr. Cantlen was so zealous on account of his principal that he cut it down to \$1,000.00 from \$15,000.00, Your Honor. That is all I have of this witness at this time.

Mr. Murman: No further questions.

Mr. Eisner: No further questions.

(Witness excused.)

WILLIAM J. DAVIS

called for the defendants: sworn. [350]

The Clerk: State your name to the Court, please.

The Witness: William J. Davis.

Direct Examination

By Mr. Eisner:

Q. What is your business, Mr. Davis?

(Testimony of William J. Davis.)

A. I am the General Auditor and Assistant Secretary of the California Motor Transport, Limited, and its affiliated companies.

Q. How long have you occupied that position?

A. Since the fall of 1937.

Q. Generally speaking, what are your duties, Mr. Davis, as such Auditor and General Superintendent?

A. Well, I am in charge of all internal auditing of the several corporations, auditing personnel, all books and records and legal documents, and fit in in a general way to other departments, as well.

Q. By the way, Mr. Davis, does the California Motor Transport Company have terminals and offices at various parts of the State of California?

A. Yes.

Q. How many terminals do they have?

A. Oh, we maintain company-owned terminals at Los Angeles, Bakersfield, Fresno, San Luis Obispo, Salinas, San Jose, Oakland and, of course, San Francisco, and other agencies at various other points and places in the State of California.

Q. Approximately how many employees does the California [351] Motor Transport Company have?

A. The several affiliated companies between, oh, five and six hundred.

Q. Now, Mr. Davis, you are acquainted with Mr. Cantlen?

A. Yes, I have been for a good many years.

Q. You were present at a conversation at which Mr. Coughlin and Mr. Cantlen were present also, in the month of July, 1946, in which conversation it per-

(Testimony of William J. Davis.)

tained to a possible renewal of the liability policy that was then held by California Motor Transport Company by Fidelity & Casualty Company?

A. Yes, I was present at that meeting. I don't recall the dates, whether it was in July or the latter part of July or the first part of August, but I was present at the discussion involving the subject of our renewal of our public liability and private liability insurance, in Mr. Coughlin's office, in which Mr. Cantlen was present.

Q. And that office was in San Francisco?

A. Yes.

Q. Now, Mr. Davis, will you state, as nearly as you recall, the substance of that conversation, what was said by the parties present?

A. To the best of my recollection, Mr. Cantlen and Mr. Coughlin started off their conversation before I was present. I think I was called in after they had been engaged in [352] conversation for some time, I don't know how long, but I recall that Mr. Cantlen was discussing our experiences and he was inclined to believe that F. & C. would want an increase in rates. I recall very distinctly bringing up a matter that Mr. Coughlin didn't think of at the time, and that was that we had just received a substantial rate increase in our transportation rates, that is, and that would automatically be passed along in premiums to the insurance company through the increase of our gross receipts. The increase was enjoyed by us in July of 1946 and we were also elated

(Testimony of William J. Davis.)

at getting it on account of all during the war years, we were at a very depressed rate.

Mr. Eisner: Just a moment——

A. That is why I recall specifically telling Mr. Cantlen about that rate increase, because the experience record that he presented didn't bring it up to that current date. The increase, as I recall, was 19%, less a 5 or 6% emergency increase that we had received about 30 or 60 days beforehand. I also called Mr. Cantlen's attention to the fact that we had an application pending before the Public Utilities Commission, which I think at that time was known as the California Railroad Commission, that we applied for an increase, that, if granted, would automatically be passed on in earned premiums to the F. & C.

I also cited the fact that we had purchased [353] substantially in new equipment; that a good deal of our personnel that were called into duty during the war had returned, and I think that this was very forcibly brought out by reduction in the re-occurrence of accidents.

All these things were brought out to support our contention that re-insurance should not be at any higher rate and should be continued in effect at the rate, the present rate, and Mr. Coughlin very specifically told Mr. Cantlen he definitely would not go along on any rate increase at that time. That was the substance of the conversation as I recall it.

Q. Now, Mr. Davis—can I have Exhibit “I”—I show you Defendants' Exhibit “I,” which is the letter from Mr. Cantlen, which accompanied the binder

(Testimony of William J. Davis.)

when it was delivered to Mr. Coughlin, and I will ask you if you retained that letter and the binder in your possession? A. Yes, I did.

Q. Was this letter and the binder, the original of that letter and the binder, turned over to you by Mr. Coughlin? A. Yes, it was.

Q. Did you observe, Mr. Davis, that this letter from Mr. Cantlen states, "This contract is your comprehensive public liability and automobile damage policy and the enclosed will act as evidence of insurance pending renewal"?

A. Yes, I did observe that. [354]

Q. Now, Mr. Davis, there is in evidence in this case reports of gross receipts and payments of premium, remittances, made by California Motor Transport Company to Bayly, Martin and Fay, after September 1st, 1946, covering the period after September 1st, 1946. Did you, personally, prepare those gross reports and attend to the remittances to Bayly, Martin and Fay? A. Yes, I did.

Q. I am looking for those Exhibits, I think they are "J," "K," "L," "M," and "N." When you referred to the preparation of these reports and remittances, did you have reference to Defendants' Exhibits "J," "K," "L," "M" that I am now handing to you?

A. Yes. This is in my own handwriting, the handwriting data from which the stenographer prepares the checks. This is in my handwriting.

Q. In other words, to each of these Exhibits there is annexed a yellow sheet in your handwriting, which

(Testimony of William J. Davis.)

is the original sheet from which the checks were prepared? A. That is correct.

Q. When I say checks, and also the voucher portion?

A. That is right. We refer to this as the memorandum voucher.

Q. The yellow sheet being the memorandum voucher?

A. From which the voucher and the check itself are typed. [355]

Q. Mr. Davis, now did anyone tell you to take the rate 1.223 in figuring the public liability which is shown upon the voucher portion of those checks?

A. Did anyone tell me to use that rate?

Q. Yes.

A. No, I don't know that anyone told me that.

Q. Why did you use that rate?

A. Because of the conversation between Mr. Coughlin and Mr. Cantlen in my presence, where it was understood that the rate in effect on the policy that was expiring on September 1st would be continued.

Q. You were present at a conversation where that was said? A. I was.

Q. Where was that conversation held?

A. In Mr. Coughlin's office.

Q. Was the rate that is shown upon and that you have used in figuring these remittances the same rate that was in the policy that expired on September 1st, 1946? A. Yes, that is correct.

Q. Now, Mr. Davis, after sending these remit-

(Testimony of William J. Davis.)

tances and several checks to Bayly, Martin & Fay, did you receive any protest or objection of any kind from Bayly, Martin & Fay? A. No, sir.

Q. Did you receive any protest or objection from any person whomsoever, Fidelity & Casualty Company or Bayly, Martin & Fay? [356]

Mr. Murman: Objected to as immaterial, if the Court please.

The Court: I will allow it.

A. No, no one objected to the rate.

Q. (By Mr. Eisner): Now then, Mr. Davis, were you present at a conversation with Mr. Cantlen that occurred on or about October 22nd, 1947?

A. Yes, yes, I was.

Q. I am going to show you now Plaintiff's Exhibit '118,' did you write that letter?

A. Yes, I did.

Q. Now, Mr. Davis, will you state just the circumstances that existed and what occurred as between Mr. Cantlen and yourself when that letter was written or dictated.

The Court: Let me see the letter, first.

A. Yes, sir. Mr. Coughlin calls me into his office on the telephone——

The Court: Just a moment.

A. Oh, pardon me.

The Court: I remember the letter.

A. Mr. Coughlin called me on the phone and asked me to come into his office, and Mr. Cantlen was present, and Mr. Cantlen handed me a letter which was addressed to Bayly, Martin & Fay. It was a

(Testimony of William J. Davis.)

draft of a letter addressed to Bayly, Martin & Fay. And he asked me to have my stenographer prepare the letter [357] for my signature and give it to him. He said that I could phrase it as I wanted to, but the substance of the letter should be as indicated in his draft. Mr. Coughlin indicated it was all right for me to do so, so Mr. Cantlen and I went back to my office and I transcribed the letter on the Ediphone equipment and my secretary wrote the letter.

Q. Was Mr. Cantlen present when you transcribed the letter to your Ediphone equipment?

A. Yes, he was.

Q. Was the letter that you transcribed in substance the letter that Mr. Cantlen showed you a draft of and which he had in his possession?

A. That is correct.

Q. Now, Mr. Davis, I want to show you Plaintiff's Exhibit "12," which is the audit prepared by the Auditor of the Fidelity and Casualty Company. Now, Mr. Davis, I am showing you Plaintiff's Exhibit "12" and ask you——

The Court: That is a final audit, is it?

Mr. Eisner: That is the final audit.

Q. ——if you have seen that Exhibit or any part of it prior to the trial of this action?

A. I most definitely have seen page 2 of the Exhibit.

Q. Now, Mr. Davis, what is upon page 2?

A. The gross receipts of the several companies for the period September through January 21st of

(Testimony of William J. Davis.)

1946-47; the start of [358] September, 1946, until January 21st, 1947.

Q. Now then, under what circumstances did you see that page?

A. Well, the Auditor came down to determine the correctness of our report of gross receipts for this period, and, I will say, the payroll figures at the same time. Part of this policy was based on payrolls so he took certain payroll figures from our records.

Q. Did the Auditor have access to your books and records to take off the figures? A. Yes, he did.

Q. Then after having taken off the figures, did he submit them to you?

A. Yes, they always submit them to me.

Q. Was there any discrepancies between the gross receipts that have been reported by you as Auditor for California Motor Transport Company and its affiliates, and as shown by Defendants' Exhibits "J-2-N" and the gross receipts as ascertained by the Auditor of the Fidelity and Casualty Company and submitted to you at that time?

A. I wouldn't make any positive statement that there weren't minor errors or discrepancies. However, any time there are any discrepancies at any time between the gross receipts reported monthly and those developed by the Auditor they are called to your attention by the Auditors, and there was no such attention called to this particular audit, so [359] I am assuming that the gross receipts shown on page 2 of this Exhibit are identical with the gross receipts that we reported on our monthly basis.

(Testimony of William J. Davis.)

Q. In other words, at that time the Auditor did not call to your attention any discrepancies?

A. No.

Q. And, Mr. Davis, was anything called to your attention or submitted to your approval other than your certification of the gross receipts as shown upon the second page of that Exhibit?

A. No, nothing else.

Q. Mr. Davis, I call your attention to the following words written upon the page of the Exhibit which bears your signature, "Assured refused to sign retrospective agreements. Retrospective rates not to be used." Were those words upon that Exhibit when you signed your approval or certified to the correctness of the audited figures?

Mr. Murman: I object to that on the ground it is an attempt to vary a written instrument.

Mr. Eisner: It is no attempt to vary a written instrument.

Mr. Murman: Certainly is.

The Court: I will allow it. There is some evidence that some of that writing was not on there at the time it was signed. [360]

Mr. Murman: I remember testimony by Mr. Challburg that as to the entire Exhibit, there was writing that was not on the entire Exhibit at the time, but this is on the page that the witness himself signed.

The Court: Yes. I thought it was on that particular Exhibit.

Mr. Eisner: It was. Counsel's statement is not

(Testimony of William J. Davis.)

quite accurate, sir. I did—I said, “Mr. Challburg, with reference to that particular writing on that particular page,” whether or not that was on there.

The Court: Mr. Challburg also testified when it was signed by Mr. Davis the reference to policy—I believe Insurance Policy 12968 was at that particular page.

Mr. Murman: That is correct.

The Court: Mr. Challburg testified that was on there.

Mr. Murman: Yes.

Mr. Eisner: Your Honor remembers it absolutely?

A. Could I have that question again?

Mr. Murman: May I have a ruling on the objection?

A. Oh, I am sorry.

The Court: Overrule the objection, for the reason I have just stated.

Mr. Murman: Yes, Your Honor.

The Court: That came up on your direct case.

A. You asked me—— [361]

Q. (By Mr. Eisner): If the writing which appears on that page that bears your signature and which I have just read to you was upon that page, according to your best recollection, at the time that signature was appended?

A. I couldn't say. I couldn't say if it was there or not.

Q. You have no recollection? A. No.

Mr. Murman: That wasn't his testimony. He

(Testimony of William J. Davis.)

said he couldn't say. It isn't that he had no recollection, he said he couldn't say.

Mr. Eisner: I am asking him if he has any recollection.

The Court: I wrote down, "I can't say whether it is there or not."

Mr. Murman: That is exactly what he said.

The Court: That is what you said, isn't it?

A. That is what I said.

Q. (By Mr. Eisner): Now, Mr. Davis, there is in evidence in this case evidence that the California Motor Transport Company had had insurance policies from Fidelity and Casualty of a similar character to that that was in existence on or prior to September 1st, 1946, for a number of years. Did those prior policies call for a deposit premium, prepayment of deposit premium?

A. Yes, in all instances.

Q. In all instances? [362] A. Yes.

Q. In all prior instances, Mr. Davis?

The Court: There doesn't seem to be any debate or controversy about that.

Mr. Eisner: Very well then, I won't pursue it.

The Court: So far as I know, it has been testified to by everybody in the place.

Mr. Eisner: That the deposit premiums were regularly billed and collected?

The Court: That is right.

Mr. Eisner: All right, I won't pursue it any further.

The Court: Except on the last one.

(Testimony of William J. Davis.)

Mr. Eisner: Except on the last one.

Mr. Murman: That is correct.

Q. (By Mr. Eisner): In all prior instances, Mr. Davis, had the policies that they were issued by the Fidelity & Casualty Company been delivered to the California Motor Transport Company prior to the time or approximately the time the policies, that the prior policies, expired? A. That is correct.

Q. Now, I want to show you this Exhibit "PP," which has been shown to Mr. Coughlin here. Here it is.

The Court: That is the Manganese letter, written in July, 1946, I think.

Mr. St. Clair: November of 1946, Your Honor.

Q. (By Mr. Eisner): Now, Mr. Davis, did you handle this correspondence pertaining to this American Manganese Company? A. Yes, sir.

Q. Well, do requests frequently come from customers or shippers to receive corroboration of your insurance coverage?

A. Yes, I get any number of them over a period of a year.

Q. What is your practice with reference to them? What do you do with them?

A. I write a letter to the firm giving the inquiry relative to our insurance. I mean, I write a letter to our insurance broker transmitting the letter from the shipper or consignee and asking that they favor the firm with a letter direct, answering the inquiry, and letting me have a copy for my file so that I know that it was attended to.

(Testimony of William J. Davis.)

Q. When you get a copy of the letter for your file from Bayly, Martin and Fay, is it your practice to read that letter to see what Bayly, Martin and Fay has written to your customer?

Mr. Murman: I think that is immaterial, if the Court please.

A. No, sir. The letter I write to the broker——

Mr. Murman: As far as this party is concerned, it is immaterial.

The Court: It has been answered, but to me it is really immaterial because, after all, it is a question of [364] notice there. He gets a letter which he doesn't read, and it is his own fault.

Mr. St. Clair: That is why I didn't object to the question, Your Honor.

A. I would like to explain that, if you don't mind.

Mr. Eisner: Yes, explain your answer.

Mr. Murman: I object to the explanation.

Mr. St. Clair: He has answered what he did. It doesn't require an explanation.

A. I would like to explain, sir, all these matters are handled by my secretary and I signed a form letter. I mean, I ask the broker or insurance company to respond to the letter of the shipper or consignee and I ask for a copy of the letter.

The Court: What for?

A. To see that it is responded to. I am interested in seeing our shipper gets that information when they make an inquiry, otherwise they may not favor you with their business, but when the letter comes in from the broker, I never see it. The copy of my

(Testimony of William J. Davis.)

letter is held in the suspense file by my secretary to await a reply from the broker or insurance company and to hold in an inquiry file from there. I never even see the letter.

Q. (By Mr. Eisner): You never even see the letter?

A. No, sir, I am not interested in it. [365]

Q. I show you this letter, which is a part of Exhibit "PP," which purports to be a copy of a letter from Mr. Cantlen or Bayly, Martin & Fay to the American Manganese Steel Division and ask you when you first saw that letter and read it?

A. It was just a very few minutes ago when you gave it to me.

Q. In this court room?

A. We unquestionably have a copy of this in our files, but this is the first time I have seen the writing, to my knowledge.

Q. I am going to show you Plaintiff's Exhibit "19," Mr. Davis, which purports to be a letter, copy of a letter, written to California Motor Transport Company, by Bayly, Martin & Fay, under date of November 12, 1947. To the best of your knowledge, was the original of the letter ever received by the California Motor Transport Company?

The Court: What is the date of that?

Mr. Eisner: November 12th.

Mr. St. Clair: 1947?

Mr. Eisner: Yes, that is what I said.

A. No, to the best of my recollection I have never seen the original of that letter.

(Testimony of William J. Davis.)

The Court: Do I understand you to say the original of that letter was never sent by you, or, to answer Mr. Eisner's [366] question, that it was never delivered to the California Motor, the Defendant in this case?

A. Well, normally letters of that nature would come into my office, and I don't recall ever having seen the letter.

Mr. Eisner: Mr. Coughlin testified to the same effect, if the Court please.

Q. (By Mr. Eisner): Have you ever seen such a letter in the files of the California Transport Motor Company? A. No, sir.

Q. Mr. Davis, claims were submitted by California Motor Transport Company to the Fidelity & Casualty Company on losses that occurred between September 1st, 1946, and January 21st, 1947?

A. Yes, they were.

Q. Were those claims submitted in the same form as claims had previously been submitted under the prior existing policy? A. Yes, identical.

Q. Upon any of the claims that were presented and submitted, was there any number of any policy? Well, they speak for themselves, I will withdraw the question.

The Court: I was going to suggest the claims would speak for themselves.

Mr. Eisner: Yes.

Q. The policies, Mr. Davis, are ordinarily kept in your possession, the insurance policies, under your control? [367]

A. Yes, our policies are kept under my control.

(Testimony of William J. Davis.)

Q. When was the—was October 22nd, 1947, the first time that policies under numbers 20961 and 20930 were called to your attention?

A. Yes, the same day that Mr. Cantlen came into our place of business with the draft of the letter. If that was October 22nd, that is the first day I ever saw the policies.

Mr. Eisner: I think that is all.

The Court: I want to tell you, gentlemen, we are going to stop here sharply at 4:00 o'clock for two reasons: I have an appointment downtown at 4:15 and for another reason, I have been on this bench since 9 o'clock this morning.

Cross-Examination

By Mr. Murman:

Q. Mr. Davis, with this organization that you mentioned, you knew, did you not, you had to have filings with the Railroad Commission and the I.C.C. to carry on business? A. Yes, I do.

Q. When this binder was given you along with the letter from Mr. Cantlen stating that this insurance, that this kept your insurance in force, or words to that effect, did you check with the I.C.C. or Railroad Commission as to whether or not they have the filings on this binder?

A. No, I didn't personally check with them. The regulatory business, that is something that was always taken care of [368] by Mr. Cantlen.

Q. You relied on Mr. Cantlen to take care of that? A. That is correct.

(Testimony of William J. Davis.)

Q. So that when you got this binder, you didn't see fit to find out what kind of filing, if any, were made with the Railroad Commission and Public Utilities—I.C.C.?

A. No, I didn't.

Q. That was part of your duty if you had done it yourself, but you relied on Mr. Cantlen, is that right?

A. The brokers have always handled filings with the regulatory bureaus for us.

Q. When Mr. Cantlen, at the meeting in July, referred to the F. & C. desiring an increase of rates, is that the first time you had heard that the F. & C. were interested in increasing the rates that had been in existence for five years?

A. I don't know that Mr. Cantlen made the statement that they were interested, insisting on increase of rates. As I recall the conversation, he had our experience record and said that they might want an increase in rates.

Q. Was that the first time he brought to your attention the fact that they might want an increase in rates?

A. To my recollection, yes.

Q. Never on any previous discussion concerning renewals?

A. No. No.

Q. Coming back to this Exhibit "10," Plaintiff's Exhibit "10," [369] which was the final audit, you recall—

A. I recall the Exhibit.

Q. Mr. Eisner read you some language and you said you didn't recall whether it was on there at all at the time you signed. He didn't read this, and I will ask you whether this language was on there at the time you signed: "Rates of 150-BI, 50-PD, rates

(Testimony of William J. Davis.)

of 15-BI, 05-PD, (given to me by underwriting department):" Was that on there at the time you signed it? A. I couldn't say if it was or not.

Q. To the best of your recollection?

A. I just couldn't say. The only thing I would be interested in there was any difference in gross receipts.

Q. There is quite a space, Mr. Davis, from the top of the page where these audits as to gross receipts end, and the bottom where you signed. Don't you have any recollection as to whether there was writing in between there?

A. No, I don't know. Three years is a long time ago.

Q. Did you note at the bottom here whether "California Motor Transport Company" was written opposite "insured"?

A. No, I can't say that I noted that.

Q. How about policy numbers SPL-20950? Did you know whether that was on there?

A. No, I didn't. I don't recollect what was on there. I know when they come in it is a matter of determination of proper report and gross receipts during the period, and the [370] policy number wouldn't mean anything, or anything else. If there are any discrepancies in the amount between our report and the amount of final audit, the Auditor would call it to my attention. We have any number of them.

Q. However, your signature is opposite the word "Certified by——." A. William J. Davis.

(Testimony of William J. Davis.)

Q. And your recollection is that, in signing that, all you recall is these figures that are at the top of the page, is that right? A. That is right.

Q. Was Mr. Challburg's signature on there as yet?

A. I couldn't tell you whether he preceded mine or not.

Q. This ordinarily consists of more than one sheet, wouldn't it not? A. I believe so.

Q. Here is a second sheet under the one that bears the signature, upon the same type of paper, and carries the same general printing throughout. Do you recall whether or not you looked at that before you signed the page that preceded it?

A. I don't know whether I did or not.

Q. That has to do with the payroll, does it not?

A. That is correct.

Q. That audit as to payroll was made to determine the correctness [371] as to the payroll figures, was it not?

A. Yes. It is entirely different, I might add, to the payroll of our—entirely different from your gross receipts.

Q. I understand, but nevertheless, the audit of the payroll figure was part of the final audit, was it not? A. Yes, unquestionably.

Q. When you certified as to the other side by signing your name to the preceding page, did you certify to the correctness of these payroll figures as well?

(Testimony of William J. Davis.)

A. I don't know that that second sheet was ever given to me.

Q. Can't you tell us whether you certified to the payroll figures as well as the gross receipts?

A. No, I can't. There is no signature on it. I don't know that that document was given me at the same time this was.

Q. But you would agree to it that the final audit consists of certification both as to gross receipts and payroll?

A. Not certification, no. I said the audit consists of payroll figures, as well as gross receipts, not to certification. There is no certification on this.

Q. Then it is your statement that you can't tell us whether or not you certified to these payroll figures or not? A. No, sir, I couldn't.

Q. As to the other writing appearing herein, "Swampers and Dockmen," right down to the bottom of the page, you can't tell us now whether you saw that statement in that form? [372]

A. No, I am assuming I did, but I can't say definitely I did.

Q. Why do you assume you did?

A. Because the figures would be taken from records in our office, and presumably on the same date, so I would assume I saw these figures at the same time.

Q. Isn't it a fact your signature appearing here as it does is some evidence upon which that assumption is based? A. I would say, yes.

Q. As a matter of fact, in previously signing

(Testimony of William J. Davis.)

audits, you certified to both payroll and gross receipts, didn't you, on previous contracts all this 5-year period?

A. I would say so, if payrolls were insured.

Q. On this matter of claims now—well, before I get to that, while Mr. Schaeffer is getting out the correspondence, do you recall on October 22nd, 1947, when you signed the letter which you said Mr. Cantlen had prepared and you had typed—do you recall that?

A. Yes, I do.

Q. When you signed that letter, Mr. Davis, that was the representation or attitude of your company as to the payment of the additional premiums which the F. & C. is now claiming, isn't that correct? Isn't that the attitude of the company as appeared in that letter?

A. Oh, yes, most definitely. [373]

Q. And you ended up by saying, "At no time did we agree to a rate of \$2.20 as against our former rate of \$1.223. It is, therefore, necessary for us to decline payment of your invoices submitted in view of the aforementioned reason." Is that correct?

A. That is correct. That is the attitude.

Q. That was your attitude? Skipping to Plaintiff's Exhibit "19," which you furnished—which was furnished by F. & C. as a copy sent to them by Mr. Mettalia, and going on to the claims themselves, do you recall sending a claim to the F. & C. that involved an accident which occurred on November 19, 1946, but about which no law suit was filed until December, 1947, or until November, 1947?

(Testimony of William J. Davis.)

A. Did you say did I recall the accident?

Q. Or do you recall any accident involving a driver by the name of Murphy?

A. Oh, yes, yes, I remember that. I was a witness, I believe.

Q. That matter came to your attention in November, 1947, did it not, as far as the law suit was concerned?

A. Is there anything there to indicate that? I don't know that is the date.

Q. Well, there is a notation by the F. & C. showing the date of accident, November 19, 1946, and reported to the company on December 4, 1947, over a year afterwards.

A. Well, as I say, I don't recall. I was probably served [374] the papers in this matter. I do recall the case very well. We were, as the case developed, we were improperly made a party to that suit and it wound up by us being declared non-suit against the company.

Q. Well, when you got the papers, you referred them to the F. & C. for defense, did you not?

A. That is correct.

Q. And the F. & C. defended you, did they not?

A. Yes, that is correct.

Q. Through their lawyers? A. Yes.

Q. In the course of that reference, did you receive a letter from Mr. Tapscott of the Claims Department of F. & C., stating that F. & C. would defend that case, on reservation of their rights as to

(Testimony of William J. Davis.)

your delay in notice, but otherwise would take the Defense?

A. I may have received such a letter. I don't recall it.

Q. This reference to the F. & C. of the defense of this case took place after you had written a letter to Bayly, Martin & Fay as set forth in Plaintiff's Exhibit "18," did it not, which letter is dated October 22nd, 1947?

A. You say that this letter was written——

Q. That the reference came after this letter, Plaintiff's Exhibit "18."

Mr. Eisner: The documents speak for themselves, counsel. [375]

Mr. Murman: There is no dispute about them?

Mr. Eisner: No, one is April 21st, 1946, and the other October 22nd, 1947. A. Yes.

Q. (By Mr. Murman): The reference came afterwards? A. Yes.

Q. I show you a letter addressed to California Motor Transport Company, Limited, dated April 21st, 1947, the original of which was signed by R. M. Tapscott, Claims Attorney, purporting to be a copy of that letter, and ask you whether or not you received the original?

A. I don't recall. I have seen this letter. It is directed to our Mr. J. H. Cross. I don't recall seeing this letter before it was directed to the attention of our Mr. Cross.

Mr. Murman: Is there any dispute about that, Mr. Eisner?

(Testimony of William J. Davis.)

Mr. Eisner: I have no objection to assuming it was.

Mr. Murman: Then, may I offer it in evidence as Plaintiff Exhibit next in order, which I believe is No. 20?

(Document was marked Plaintiff's Exhibit "20" in evidence.)

The Court: I hate to break into this, Mr. Murman, but I have to leave now. What can we do about this?

Mr. Murman: I was going to read this, then that would terminate my cross-examination. [376]

The Court: Read it, then.

Mr. Murman: (Reading Plaintiff's Exhibit "20."):

Q. That is the case that the attorneys got a non-suit on, is that correct? A. That is correct.

Mr. Murman: No further questions.

The Court: I have to go to trial tomorrow and have a jury called. How long will it take you to finish this case?

Mr. Eisner: This is the last witness I have.

Mr. St. Clair: This is the end, so far as I know, Your Honor.

The Court: Have you any further examination?

Mr. St. Clair: Only to ask what that gross receipt was that Mr. Coughlin couldn't answer, and which I said was One Million One Hundred Thousand, is that it?

A. Roughly the figure would be annual.

Mr. St. Clair: That is all.

Mr. Murman: Then the case can be submitted.

The Court: Then let's mark it submitted, and I would like to have you gentlemen brief it for me. Those Exhibits, I can remember each pretty well, but I can't remember all the matter in them. Suppose you brief it and if I want to have you argue something, I will ask you.

Mr. St. Clair: We are Third Party Defendants. Our interest is very narrow. I think Mr. Murman should make the [377] first brief, then Mr. Eisner, then myself.

The Court: Yes.

Mr. Murman: I should have an opportunity to answer Mr. Eisner's brief.

The Court: Suppose you file the first brief, Mr. Murman, then Mr. Eisner can answer and Mr. Eisner in his brief can set up his claim against Mr. St. Clair and both of you can answer Mr. St. Clair's brief.

Mr. Murman: I would like to have thirty and thirty. We have to have the record written up so that we can properly refer to it.

Mr. Eisner: There is just one question that I overlooked, just one question of Mr. Davis, if the Court please: Mr. Davis, were you present at the conversation where Mr. Simpson of the Insurance Exchange Company was present with Mr. Coughlin?

Mr. Murman: Objected to.

Q. The latter part of July or in July of 1946?

Mr. Murman: Objected to as not proper redirect examination.

Mr. St. Clair: Yes, I don't think that is proper.

He has had this witness on the stand all afternoon.

The Court: I don't care about that, but he stated all Simpson said was that he could get the same rate at \$1.22, and it is hearsay, in the second place, as far as these people are concerned. [378]

Mr. Eisner: That they could get the same policy at the same rate.

The Court: Assume that is what he testified to——

Mr. Eisner: Yes, very well.

Mr. St. Clair: What is the time for filing briefs?

The Court: Let's make it ten and——

Mr. St. Clair: How about twenty, Your Honor?

Mr. Eisner: I would like more time, Your Honor.

The Court: All right, make it twenty, twenty and twenty. We will adjourn until 10:00 o'clock tomorrow morning.

Certificate of Reporter

I, Kenneth J. Peck, Official Reporter, certify that the foregoing 379 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ KENNETH J. PECK.

[Endorsed]: Filed December 29, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO RECORD ON
APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and accompanying documents and exhibits, listed below, are the originals filed in this Court, in the above-entitled case, and that they constitute the Record on Appeal herein, as designated by the Appellants, to wit:

Complaint

Order Granting Motion to Bring in Third Party Defendant

Third Party Complaint

Answer

Answer of Third Party Defendant

Memorandum Opinion

Findings of Fact and Conclusions of Law

Judgment

Notice of Appeal to Court of Appeals for the Ninth Circuit

Appellants Designation of Record, Proceedings and Evidence to be Contained in the Record on Appeal

Reporter's Transcript—Vol. 1—for September 30, 1949

Reporter's Transcript—Vol. 2—for October 10, 11, 17, 1949

Plaintiff's Exhibits Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18 and 19 and 20

Defendants' Exhibits Nos. A, B, C, D, E, F, G, H, I, J, K, L, M and N

AA, BB, CC, DD, EE, FF, GG, HH, II, JJ, KK, LL, MM, NN, OO, PP, QQ, RR, SS-1, SS-2, SS-3 and SS-4

Envelope of miscellaneous papers.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, this 25th day of October, A.D., 1950.

C. W. CALBREATH,
Clerk,

[Seal]: By M. E. VAN BUREN,
Deputy Clerk.

[Endorsed]: No. 12722. United States Court of Appeals for the Ninth Circuit. California Motor Transport Co., Ltd., a Corporation, et al., Appellants vs. The Fidelity and Casualty Company of New York, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed October 26, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 12722

CALIFORNIA MOTOR TRANSPORT CO., et al.,
Appellants,

vs.

The Fidelity and Casualty Company of New York
and Bayly, Martin & Fay, Inc., a Corporation,
Respondents.

STATEMENT OF POINTS UPON WHICH
APPELLANTS INTEND TO RELY

The points upon which appellants, and each of them, intend to rely upon the appeal of the above-entitled action are as follows:

1. The insufficiency of the evidence to support the findings of fact upon which judgment in favor of respondent, The Fidelity and Casualty Company of New York, was predicated.
2. The insufficiency of the evidence to support the findings of fact upon which judgment in favor of respondent, Bayly, Martin & Fay, Inc., was predicated.
3. The decision is not supported by the evidence.
4. The decision is against the law.
5. The insufficiency of the evidence to support a finding that Policy SPL 20950 or Policy SPL 20968

was ever accepted, or that either of said policies ever became effective.

6. The insufficiency of the evidence to support a finding that Policy SPL 20950 or Policy SPL 20968 was ever issued or offered upon any premium basis other than a retrospective rating basis.

7. The failure of the Trial Court to find that Policy SPL 20950 and Policy SPL 20968 were offered only in conjunction with a retrospective rating plan, which said plan was never accepted.

8. The insufficiency of the evidence to support a finding that appellants reported claims and losses under Policy SPL 20950 or Policy SPL 20968, and that appellants remitted monthly premium payments under said policies.

9. The failure of the Trial Court to find that the insurance in effect during the period in dispute was a certain binder made and executed by respondent, The Fidelity and Casualty Company of New York, which said binder was in effect during the entire period covered by this action.

10. The insufficiency of the evidence to establish that respondent, Bayly, Martin & Fay, Inc., accepted the policies sued upon, or either of them.

11. The insufficiency of the evidence to support a finding that respondent, Bayly, Martin & Fay, Inc., did not represent to appellants that the binder issued by respondent, The Fidelity and Casualty Company of New York, provided appellants with insurance during the negotiations between the parties.

12. The insufficiency of the evidence to support a finding that either Policy SPL 20950 or Policy SPL 20968 was accepted by respondent, Bayly, Martin & Fay, Inc., with the knowledge and in accordance with the instructions of appellants.

13. The insufficiency of the evidence to support a finding that respondent, Bayly, Martin & Fay, Inc., did not conceal the receipt of Policies SPL 20950 and SPL 20968, and that said respondent did not fail to notify appellants thereof.

14. The failure of the Trial Court to find that respondent, Bayly, Martin & Fay, Inc., negligently omitted to notify appellants, and each of them, of the receipt of Policies SPL 20950 and SPL 20968 from respondent, The Fidelity and Casualty Company of New York.

15. The failure of the Trial Court to find that respondent, Bayly, Martin & Fay, Inc., negligently omitted and failed to deliver said policies to appellants, and each of them.

16. The failure of the trial Court to find that if the policies of insurance sued upon were accepted, they were accepted by respondent, Bayly, Martin & Fay, Inc., contrary to and in violation of its authority.

Dated: October 31st, 1950.

/s/NORMAN A. EISNER,
Attorney for Appellants.

Affidavits of Service by Mail attached.

[Endorsed]: Filed November 1, 1950.

No. 12,722

United States Court of Appeals
For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY OF
NEW YORK (a corporation),

Appellee.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

NORMAN A. EISNER,

Mills Building, San Francisco 4, California,

Attorney for Appellants.

FILED

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U.S. DISTRICT COURT

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No. 12,722

United States Court of Appeals For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY OF
NEW YORK (a corporation),

Appellee.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

BASIS OF JURISDICTION.

This action was brought by the Fidelity & Casualty Company of New York, a New York corporation, against defendants, California corporations and citizens, to collect insurance premiums in the amount of \$7841.99. An answer was filed and also, with leave of Court, a third party complaint. By the third party complaint the defendants allege that if any liability exists to the plaintiff, it is due to wrongful acts and

negligence of Bayly, Martin & Fay, Inc., the insurance broker in the transaction.

The action was brought and tried in the United States District Court, for the Northern District of California, Southern Division. Judgment was rendered in favor of the plaintiff and third party defendant, and this appeal has been taken by the defendants. This Court has jurisdiction upon appeal to review the judgment of the District Court below by virtue of the provisions of Title 28 U.S.C. 1291 and 1294.

STATEMENT OF THE CASE.

Defendants are highway carriers, jointly owned and operated. The complaint alleges that "on or about September 1, 1946 * * * plaintiff made, executed and issued to defendants * * * Comprehensive, General-Automobile Policy No. SPL-20968¹ (Tr. p. 4) and at the same time made, executed and issued to defendants Policy No. SPL-20950 covering excess insurance over that provided for in Policy No. SPL-20968. (Tr. p. 7.) There is no forthright allegation of acceptance of either of these policies. The action is for premiums upon these policies from September 1, 1946 to January 21, 1947.

The answer puts in issue the execution, issuance, delivery and acceptance of the policies and pleads affirmatively that a previous policy (SPL-1457) is-

¹The initials SPL stand for Special Public Liability.

sued by plaintiff and covering defendants was in effect from September 1, 1945 to September 1, 1946; that prior to September 1, 1946, defendants received from third party defendant, their agent, a binder issued by plaintiff, which the agent informed defendants would constitute coverage at the same rate as in Policy SPL 1457, pending negotiations for new insurance; that Policy SPL 1457 required a monthly report of gross earnings and a payment of premium based thereon; that from and after September 1, 1946, defendants continued said monthly reports of gross earnings and remitted premiums at the rate specified in Policy SPL 1457; that plaintiff accepted said reports and payments without objection; that the coverage by plaintiff terminated January 21, 1947 and that the first knowledge defendants had of any demand for increased premium was in August, 1947.²

The third party complaint pleads in separate counts against the agent fraud, negligence and breach of duty. It alleges that cross-defendant misrepresented to the defendants that the old rate of insurance would be effective pending negotiations for new insurance; the receipt by the agent of Policies SPL 20968 and 20950, and failure to deliver same to defendants or inform defendants of their receipt or disclose their contents; concealment from defendants of the existence or acceptance of said policies, and conduct by

²August is an error. Bayly, Martin & Fay wrote a letter dated August 7, 1947, but did not deliver it until October 22, 1947, and until then defendants had no knowledge of the demand for additional premium. (Tr. pp. 255-274.)

which defendants were kept in ignorance of the existence of said policies and led to believe and act upon the assumption that during the entire period of September 1, 1946 to January 21, 1947, the effective rate was that specified in Policy SPL 1457.

As between plaintiff and defendants, appellants contend:

1. The evidence is wholly insufficient to prove that Policies SPL 20968 and 20950 were ever issued or accepted. The evidence discloses, without contradiction, that, during and as a part of negotiations carried on between the agent and plaintiff for new insurance for defendants, the policies were submitted by plaintiff to the agent in conjunction with a retrospective agreement, pursuant to which the rate of premium would fluctuate in accordance with loss experience of defendants. The policies and agreement together constituted the proposed insurance contract. The policies were not written or offered independently of the agreement or on the basis of a guaranteed rate of premium. The insured refused to consider a retrospective rating plan and never considered and never had the opportunity to consider the acceptance of the policies independently of such a plan. The contract that was proposed was never accepted and the policies never became effective.

2. That the conduct of the parties clearly demonstrates that the parties, plaintiff, defendants and cross-defendant, never considered or deemed these policies to be in effect.

3. That plaintiff, by its conduct, has waived and is estopped to assert any claim for additional premium.

As between defendants and third party defendant, appellants contend:

1. If Policies SPL 20968 and 20950 were ever accepted, it could only have been by wrongful and unauthorized acts of the agent.

2. If Policies SPL 20968 and 20950 were delivered to the agent and were in effect, the agent committed a breach of duty, statutory as well as common law, in holding the policies and failing to deliver them to the defendants.

3. Third party defendant by representation and conduct deliberately led defendants to believe during the entire period September 1, 1946 to January 21, 1947, and thereafter until October 22, 1947, that their insurance coverage was at the rate provided for in Policy SPL 1457, and that defendants had no additional liability.

SPECIFICATION OF ERRORS RELIED UPON.

1. The evidence is insufficient to support the finding (11) that on or about September 1, 1946, at the request of defendants and third party plaintiffs, and each of them, in San Francisco, California, plaintiff made, executed and issued to said defendants its written contract of primary casualty insurance known as "Comprehensive General-Automobile" Policy No. SPL 20968.

2. The evidence is insufficient to support the finding (12) that on or about September 1, 1946, at the request of defendants and third party plaintiffs, plaintiff made, executed and issued to said defendants and third party plaintiffs its written contract of casualty insurance known as "Comprehensive General-Automobile" Policy No. SPL-20950.

3. The evidence is insufficient to support the finding (13) that plaintiff delivered said policies to third party defendant, the agent of defendants and third party plaintiffs.

4. The evidence is insufficient to support the finding (13) that defendants reported claims and law suits under said policies or remitted monthly premium payments under said policies or that the said payments were received by plaintiff on account of the total earned premiums under said policies, or subject to final audit at said rates.

5. Failure of the Court to find that said policies were submitted by plaintiff and handed by plaintiff to third party defendant, in conjunction with a retrospective agreement which was an integral part of the policies, and without the execution of which the policies would not be issued.

6. Failure of the Court to find that the retrospective agreement was never executed or accepted.

7. Failure of the Court to find that the said policies were retained by third party defendant, and never delivered to defendants, for the reason that they were never issued and never became effective.

8. Insufficiency of the evidence to establish that the policies, or either of them, was ever accepted.

9. Insufficiency of the evidence to support the finding (15) that defendants paid to plaintiff \$9131.13, or any other sum, on account of earned premium of Policy SPL-20968.

10. Failure of the Court to find that plaintiff, by its conduct in knowingly accepting, without protest or objection, reports and payments based on the premium rate of the former Policy SPL-1427, has waived and is estopped to assert any claim for additional premium.

11. Failure of the Court to find upon the issue of waiver and estoppel of plaintiff, a defense affirmatively pleaded by defendants.

12. Failure of the Court to find that if these policies were accepted, they were accepted by the wrongful and unauthorized action of third party defendant.

13. Insufficiency of the evidence to support the finding (18) that third party defendant did not represent to defendants that a binder issued on or about August 7, 1946, covered defendants pending negotiations for new insurance.

14. Insufficiency of the evidence to support the finding (18) that third party defendant at no time made representations to defendants that were false and untrue, or that third party defendant had reasonable grounds for not believing true.

15. Insufficiency of the evidence to support the finding that third party defendant received and ac-

cepted the aforesaid policies from plaintiff with the knowledge of and in accordance with the instructions of defendants.

16. Insufficiency of the evidence to support the finding that third party defendant at no time concealed from and failed to notify defendants of the receipt of said policies from plaintiff.

17. Failure of the Court to find that third party defendant retained said policies and did not deliver or submit them to defendants until Oct. 22, 1947.

18. Failure of the Court to find that third party defendant from April 19, 1947, when a claim for premium under Policy SPL-20968 was first asserted by plaintiff, until Oct. 22, 1947, deliberately concealed from defendants the fact that plaintiff asserted a claim for premium under said policy.

ARGUMENT.

This action is for the recovery of premiums alleged to have been earned under and according to the terms of two insurance policies, Nos. SPL-20968 and SPL-20950. The policies are alleged to have been in effect from September 1, 1946, until January 21, 1947. If these policies were not in effect, then the cause of action alleged has not been proved.

Defendants had been insured by plaintiff for a number of years. Its policy for the year September 1, 1945 to September 1, 1946 was known as No. SPL-1457. The rate of premium upon this policy was

1.223% of the gross income, and under it defendants were required to submit monthly reports of gross income, make monthly remittances based thereon, and at the expiration of the policy submit their records of gross receipts for a final audit. Prior to its expiration, August 27, 1946, plaintiff issued a binder. (Exhibit B.) This binder was delivered by the broker, third party defendant, to defendants with a letter (Exhibit I) in which it is stated: "*This contract is your Comprehensive Public Liability and Automobile Damage Policy and the enclosed will act as evidence of insurance PENDING RENEWAL.*" It is undisputed that Bayly, Martin & Fay, Inc. carried on negotiations with plaintiff endeavoring to agree on a basis of renewal and that these negotiations continued until January 17, 1947. It is undisputed that defendants were covered by insurance by plaintiff from September 1, 1946 until January 21, 1947, and that during that period defendants continued to report and pay premiums according to the terms and rate of Policy 1457, and that plaintiff accepted and retained these reports and payments without protest or objection.

The question in this case is not whether during September 1, 1946 and January 21, 1947, defendants were covered by a binder or whether they were covered by an oral extension of their former policy. The question is whether or not the two policies sued upon in this action were in effect. The length of time that negotiations for a new contract of insurance should be carried on was optional with both sides. Either could terminate the negotiations at will. A new con-

tract could only become effective by mutual agreement. Unless a new contract was entered into for a different rate, the coverage could only have been at the rate contained in the former policy. Plaintiff contends that from September 1, 1946 until January 21, 1947, these new contracts of insurance were in effect. Appellants maintain that the evidence does not support a finding that they were in effect.

It is unnecessary to cite authority to the point that the essentials of a contract of insurance are not different from those of any other contract. There must be a meeting of minds. The offer and acceptance must conform. The policy must be accepted on the same terms and conditions upon which it is offered or issued.

“A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties agree upon the same thing in the same sense, and unless they do so agree there is no contract.”

K. C. Working C. Co. v. Eureka-Sec. Ins. Co.,
82 Cal. App. (2d) 120, 133;

American Can Co. v. The Agricultural Ins. Co.,
12 Cal. App. 133, 137.

It has already been indicated that the rate of premium on Policy 1457 was \$1.223 for \$100.00 of gross receipts. It was a guaranteed or fixed rate of premium. The present action is based on the theory of a guaranteed or fixed rate of premium of \$2.20 for each \$100.00 of gross income. The increase is almost 100%.

POLICIES SPL 20968 AND 20950 WERE NEVER OFFERED EXCEPT IN CONJUNCTION AND COUPLED WITH A RETROSPECTIVE AGREEMENT, WHICH LATTER HAD TO BE ACCEPTED AND EXECUTED BEFORE THE POLICIES WOULD BECOME EFFECTIVE.

Appellants are urging, with the utmost seriousness, that the finding of the trial Court that the policies sued upon were in effect from September 1, 1946 to January 21, 1947, is not supported by the evidence. Being well aware of the rule that a judgment will not be disturbed if supported by substantial evidence, we shall endeavor to show that such evidence is lacking in this case. For this reason, we shall not dwell upon the testimony of appellants, but try to demonstrate out of the mouths of respondent's own witnesses and officials, and by their conduct, that these policies were not in effect. So far as appellants are concerned, their testimony is that they were told and understood that the binder would constitute their coverage pending negotiations for renewal and at the rate in the expiring policy (Tr. pp. 347, 403); that only the retrospective agreement was submitted to them; that they knew nothing of these policies (Tr. p. 405); that no flat or guaranteed rate was ever submitted (Tr. p. 406); that they refused to accept a retrospective plan of rating (Tr. pp. 404, 406); that they never accepted or authorized the acceptance of these policies (Tr. p. 406); that they never agreed to a 2.20 rate of premium (Tr. p. 407); that the first they knew of any demand for additional premium was on October 22, 1947. (Tr. p. 407.)

THE INSTRUMENTS.

Let us first look at the documents themselves. These policies are Exhibits 3 and 4. The retrospective agreement (Exhibit C) refers specifically to Policy SPL-20968 (the primary coverage) and states that it is about to be issued upon the security of the agreement. The language used is as follows:

“WHEREAS, at the special instance and request of the INSURED and *upon the security of this Agreement*, the COMPANY is about to issue to the INSURED the following policy:

Automobile Liability Policy Number SPL-20968

WHEREAS, the COMPANY, for the mutual benefit of the COMPANY and the INSURED, has proposed the adoption, by agreement, of the Retrospective Rating Plan hereinafter set forth *in modification of the Premium provisions of the said policy*, and *such proposal having been accepted by the INSURED*,

NOW, THEREFORE, in consideration of the premises and the sum of one dollar by each of the parties hereto, to the other, in hand paid, the receipt of which is hereby acknowledged, IT IS AGREED:”

Policy SPL-20950 (excess coverage) contains an endorsement (No. 8), which refers to and ties in the retrospective rating plan covered by the agreement. Explanatory of this endorsement, Charles A. Mettalia, casualty superintendent of plaintiff, testified as follows:

“Q. The retrospective arrangement or plan mentioned here has reference to the retrospective

agreement which is dated September 1, 1946, the same date as the policy; that is true, isn't it?

A. Yes.

Q. Is it a fact that this endorsement, Retrospective Rating Plan, was upon this policy at the time you delivered it to Mr. Cantlen?

A. I assume that all these endorsements were attached to the policy.

* * * * *

Q. Now, Mr. Mettalia, I call your attention to this language of the retrospective agreement, which is Defendants' Exhibit C: 'Whereas at the special instance and request of the insured and upon the security of this agreement, the company is about to issue to the insured the following policy: Automobile Liability Policy No. SPL-20968'. This policy No. SPL20968 referred to in the retrospective agreement is the same policy numbered SPL20968 which is Plaintiff's Exhibit 3 in this case, is that correct?

A. I believe so." (Tr. pp. 124-125.)

The instruments show upon their face that they are parts of one transaction, that the policies were not issued independently or on a flat or guaranteed rate of premium, but only in conjunction with a retrospective rating plan covered by the agreement.

THE TESTIMONY DISCLOSES THAT THE POLICIES WERE ONLY OFFERED IN CONJUNCTION WITH THE RETROSPECTIVE AGREEMENT AND NOT ON A GUARANTEED BASIS.

Charles A. Mettalia is casualty superintendent of plaintiff. He delivered the two policies to Mr. Cant-

len of Bayly, Martin & Fay approximately October 1st or 2nd, 1946. He delivered to Mr. Cantlen the retrospective agreement at the same time he delivered the policies.

“Q. Approximately when were they delivered to Mr. Cantlen, according to your best recollection?

A. I would say one of the policies was—let me see; that is about October 1, approximately October 1, maybe October 2nd.

Q. Now, Mr. Mettalia, you presented this retrospective agreement and the two policies to Mr. Cantlen at one time, did you not?

A. I believe so.

* * * * *

Q. What did you say to Mr. Cantlen when you gave him this retrospective agreement at the same time that you gave him these policies?

A. That we wanted to accept the policies on—*we wanted that signed so that that would be part of the renewal policy.* A retrospective rate basis is more or less to the advantage of the insured by signing such an agreement. Of course it could be the other way, too.

Q. Could be the other way, too?

A. It is possible, yes.

Q. Isn't it a fact that you asked Mr. Cantlen at the same time to have the insured sign this agreement?

A. Yes.

Q. You did? Now, then, Mr. Mettalia, this retrospective agreement was never signed, was it?

A. That is correct.

Q. Did Mr. Cantlen tell you that he submitted the retrospective agreement to the client, the insured?

A. Yes.

Q. Did Mr. Cantlen tell you that the insured refused to sign the retrospective agreement?

A. Yes.

Q. Was it after the insured refused to sign the retrospective agreement that the insurance was cancelled by the Fidelity & Casualty Company?

A. Yes." (Tr. pp. 106-109.)

When it became evident to Mr. Cantlen that California Motor would not accept a retrospective plan of insurance, he endeavored to have the plaintiff write the insurance on a guaranteed basis. The following testimony of Mr. Mettalia shows clearly that these policies were never written or offered except in conjunction with the retrospective agreement:

"Q. Did Mr. Cantlen ever tell you that he had not delivered either policy to the insured?

A. Several months later.

Q. When did Mr. Cantlen tell you first, for the first time, he had never delivered either one of those policies to the insured?

A. I don't recall ever hearing that statement from Mr. Cantlen.

Q. You said it was told you several months later. Who told you?

A. Several months later when we demanded the retrospective rating agreement to be signed, Mr. Cantlen said that the insured was not in agreement with the—that is, wasn't willing to

sign the agreement, and whether or not we could work up or revise or write up a new program, something like that. I don't recall the exact words.

Q. To get this clear, when you say 'a few months later' you mean after September 1, 1946?

A. Oh, yes, possibly November.

Q. You demanded of Mr. Cantlen the signing of the retrospective agreement?

A. Yes.

Q. That is correct?

A. That is correct.

Q. And Mr. Cantlen then told you he couldn't get the retrospective agreement signed, is that true?

A. That is correct.

Q. What did you mean when you said you learned a few months later Mr. Cantlen had not delivered the policies to the insured?

A. I repeat what I just mentioned a few minutes ago, that several months later Mr. Cantlen, when I approached him on signing the agreement, said that the insured would not sign the agreement, that he felt the rate was too high, something like that, and *whether or not we could work up a program on a guaranteed cost basis.*

Q. What did you tell Mr. Cantlen then? That you could not?

A. *That I would try to work up some guaranteed cost basis, but certainly under no conditions would the rate of \$2 be acceptable as the guaranteed cost policy,* bearing in mind that there was a percentage of increase from the entire industry that is the automobile business in this State, of approximately thirty-three per cent, and that

if it did go on a guaranteed basis it would be in excess of \$2.

* * * * *

Q. Mr. Cantlen told you the insured would not agree to that, didn't he?

A. That is correct.

Q. Mr. Cantlen told you that the rate was too high, that the insured would not accept such rate, is that it?

A. That is right. He was referring to the maximum.

Q. Then he asked you if you could negotiate and get something that might be acceptable to the insured?

A. That is correct.

Q. Did you have anything else to offer Mr. Cantlen, any different rate than had been submitted?

A. I don't recall, no. We were going to negotiate with the home office, and finally they decided to send out cancellation notices.

* * * * *

Q. From the time of your original negotiations with Mr. Cantlen in the month of August, then, when you talked to him about rates, you were talking to him about a rate that would be adjusted according to the loss experience of the insured?

A. That is correct.

Q. And your conversations with Mr. Cantlen during the month of August, then, and at all times, were based upon a premium that would be ultimately figured upon a rate that would ultimately be determined according to the loss experience of the insured?

A. Correct, providing the insured did agree to it, or providing he would go along on the retrospective agreement.” (Tr. pp. 126-130.)

The \$2.00 rate, which Mr. Mettalia stated was definitely unacceptable to the company on a guaranteed basis is the rate called for by Policy No. SPL 20968. The guaranteed rate of \$2.00 was both unacceptable to plaintiff and unacceptable to defendants. No acceptance of such a rate was ever communicated to plaintiff.

Mr. Cantlen.

“Q. Did you ever tell Mr. Mettalia or Mr. O'Malley that California Transport Company would accept policies with a 2.20 rate?

A. No, I did not.” (Tr. p. 273.)

Without either offer or acceptance both essential elements of a contract are lacking.

The retrospective agreement was drawn by the New York office, the home office of plaintiff, and had already been signed by a vice president when the policies and agreement were handed to Mr. Cantlen. Its execution was not discretionary with the local office; the agreement was a definite requirement of the officials and home office of the company. (Tr. p. 145.)

Mr. C. L. Anderson is resident manager of plaintiff. Exhibit RR (Tr. p. 332) is a letter written by Mr. Anderson to Bayly, Martin & Fay. This letter definitely and unequivocally confirms the fact that plaintiff was only willing to renew the insurance sub-

ject to the retrospective rating plan covered by the agreement. It is dated December 11, 1946. It shows that the retrospective agreement was then, and had been, adamantly insisted upon as a condition precedent to renewal of the insurance. The renewal could not be accomplished without execution of the retrospective agreement and the closing words are: "It is necessary for us to put a time limit within which the matter of *renewal*, etc. *must be consummated*."

It is difficult to imagine a stronger or more conclusive statement. Just eight days later, December 19, 1946, the time limit for renewal was set, and on that date notice was given to defendant of cancellation of coverage as of January 21, 1947. (Tr. pp. 92-93.)

On December 19, 1946, the same date that notice of cancellation was sent to defendant, Mr. Mettalia sent a telegram (Plaintiff's Exhibit 8, Tr. p. 109) to the home office of the plaintiff in which it is stated: "California Motor Transport SPL-20950 and 20968. Request home office send cancellation notice to ICC effective January 21 Stop Insured refused to sign retrospective agreement."³

Henry R. Cantlen is vice president in charge of the San Francisco office of Bayly, Martin & Fay. He personally carried on negotiations with the plaintiff

³We shall later in this brief demonstrate that the reference to these policy numbers was not a reference to these particular policies, but only a convenient means of referring to pending coverage, so that when and if new insurance was issued the policies would be given those numbers and new filings with the Regulatory Body would not be required.

concerning renewal of the insurance. His testimony likewise demonstrates that the policies were never offered and were never open to acceptance other than in conjunction with the execution of the retrospective agreement.

“Q. When was the definite information conveyed to you by Fidelity, that Fidelity would only consider renewal of the insurance policy on a retrospective arrangement?

A. They told me at a meeting that took place about the middle of August—August 15th they indicated that definitely—not definitely, but that the home office were insisting upon the renewal of this contract on a retrospective basis.

Q. Did you thereafter see Mr. Coughlin?

A. Yes, I did.

Q. How long after August 15th, according to your best recollection?

A. According to my file, it was about August 27th.

Q. At that meeting at which you saw Mr. Coughlin, did you express to Mr. Coughlin the significance of a retrospective arrangement, what such an arrangement would entail and mean?

A. Yes, I did, sir.

Q. Did you tell him at that meeting that Fidelity was insisting upon renewal of the insurance upon a retrospective arrangement?

A. Yes, I did.

Q. I understood you to say he expressed himself as not being pleased with the idea of a retrospective arrangement.

A. He did.

Q. Thereafter you took the matter up with Mr. Mettalia and Mr. O'Malley again, both told you that the company was adamant and that the home office would only consider the business on the basis of a retrospective plan, is that true?

A. That is true.

Q. Approximately when was it that Mr. Mettalia or Mr. O'Malley gave you that information?

A. The *ultimatum*, *definite ultimatum*, came just prior to the time that the policies were issued, so that would have been in the neighborhood of September 22nd or 23rd." (Tr. pp. 262-263.) (See also Tr. pp. 239, 243-244.)

As further evidence that the policies were not issued or accepted is the fact that Cantlen not only continued negotiations with plaintiff in an endeavor to have the insurance renewed on an acceptable guaranteed basis, but also continued negotiations with other companies. (Tr. pp. 242-243.)

After receiving the policies and retrospective agreement, Cantlen did not show the policies to defendant, but only submitted the retrospective agreement. This was in October, 1946.

"Q. So you told him the company was insisting on your declaration of the policies, as you put it, is that correct—the signing of the retrospective agreement and the declaration of the policies?

A. Correct.

Q. What happened after that?

A. I again went over the workings of the retrospective plan and left the retrospective agreement with him, and he said he wanted to look

them over and would probably have his attorney look them over, but he again reiterated that he would not be wholly satisfied with such a plan, and asked me if I couldn't interest a market, so I told him we were scouring the market to obtain a company *that would write the business on a guaranteed plan in lieu of a retrospective writing plan.*

* * * * *

Q. This was in October, was it, or the latter part of September?

A. No, this would have been in October." (Tr. pp. 244-245.)

When asked by counsel for plaintiff if he noticed that the policies set up the 2.20 rate, Mr. Cantlen replied:

"Yes, they set up those rates, but they are issued in conjunction with another agreement".

"Q. I would like to have you take Policy No. 20968, which is the primary policy, Plaintiff's Exhibit 3, and point out to the Court, where in that policy there is any reference made to the retrospective agreement.

A. It would not be necessary to be referred to in here *because the policies were definitely issued with the understanding that the retrospective agreement would be entered into.*" (Tr. p. 295.)

The record in this case is so replete with testimony demonstrating without any question that these policies were only to be effective on execution of the retrospective agreement, that it is difficult to keep the quotations within reasonable bounds. The following

is most important: Bayly, Martin & Fay, although it received the policies and the retrospective agreement simultaneously, delivered the retrospective agreement to defendant for examination as soon as received, the beginning of October, 1946, but retained the policies in its possession until October 22, 1947. Mr. Cantlen was asked why the policies were not delivered before October 22, 1947, and his answer could not be more to the point.

“Q. Why did Bayly, Martin & Fay not deliver Policies 20950 and 20968 to California Motors prior to October 22, 1947?

A. *The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was not signed, so therefore, IN OUR OPINION, THE TRANSACTION WASN'T COMPLETED.*” (Tr. p. 273.)

Also on examination by his own counsel, Mr. Cantlen testified (Tr. p. 339):

“Q. Were you asked on direct examination, when someone else called you as a witness, as to why you didn't deliver the policy to Mr. Coughlin when you received it in October, 1946?

A. *I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned.*”

What stronger or more definite statement could be made?

Also, we respectfully call attention to the following testimony of Mr. Cantlen. Bayly, Martin & Fay had received from defendants the premium for the month of September, 1946, in November, 1946, but did not turn it over to plaintiff until January, 1947. Counsel for Bayly, Martin & Fay asked for an explanation for this delay in remittance and Cantlen replied:

“Yes, I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up *because the transaction had not been completed, as far as we were concerned; THERE WAS NO AGREEMENT; the assured had not consented or agreed to the retrospective basis on which the company was insisting; and so I felt that it was still an unsettled problem, and, to my best recollection, I told her just to hold that temporarily.*” (Tr. pp. 338-339.)

This was in November, 1946. How, in the face of such testimony, is it possible to conclude that there was an agreement, and particularly an agreement that the policies were issued and accepted on a guaranteed basis?

We believe that the testimony of both Mr. Mettalia and Mr. Cantlen establishes beyond any question that the policies were never offered for acceptance, except in conjunction with the acceptance of a retrospective rating plan, which defendant at all times refused to consider. We shall now attempt to demonstrate that

neither the insurer nor the broker considered these policies in effect and that the idea of attempting to base a claim upon them for additional premium was first conceived by Fidelity in the month of April, 1947.

**THE CONDUCT OF THE PARTIES DEMONSTRATES THAT THESE
POLICIES WERE NOT CONSIDERED IN EFFECT.**

Policies 20968 and 20950 call for payment of substantial deposit premiums. Deposit premiums had been required by all of the several policies that plaintiff had previously written for the defendant. In all prior instances the deposit premiums had been demanded and paid at the time the policies were issued. In this instance, the deposit premiums were never billed by the plaintiff, were never asked for by the plaintiff, and were never billed or asked for by the broker.

Mr. Rechnagel, cashier of the plaintiff, stated that if a policy calls for a deposit premium, it is the business of his department to bill and collect it; that he had no record of any bill having been sent for the deposit premiums on these policies and that according to general practice it should have been billed. (Tr. pp. 188-191.)

If these policies were considered in effect, it seems strange that the general practice of the company should not have been followed. The deposit premium on Policy 20968 alone was \$6060.00, and on 20950 it

was \$6685.40. It unquestionably should and would have been billed and collected if the policies had actually been issued.

“Q. When you say it should have been billed, you mean according to the general practice of your company when a policy is issued which calls for a deposit premium, that it is the practice and the duty of your office to bill for that deposit premium?

A. That is right.” (Tr. p. 190.)

Policy 1457 required defendant to make monthly reports of gross receipts and remit premiums based thereon at the rate of 1.223%. For the period from September 1, 1946 until January 21, 1947, defendant continued to send to Bayly, Martin & Fay its monthly reports of gross receipts and remit premiums based thereon at the same rate, 1.223. Bayly, Martin & Fay in turn and according to regular practice processed the reports made by defendant and refigured the premium, breaking it down into public liability at the rate of .997 and property damage at .226 (total 1.223). (Tr. pp. 252, 289.) These reports and checks of Bayly, Martin & Fay to cover at said rates, were sent by Bayly, Martin & Fay to Fidelity.

The auditing department of Fidelity received and checked the reports of Bayly, Martin & Fay and endorsed approval thereon. (See Exhibit 10.) The auditing department of Fidelity in turn made out its own written reports showing premium earned at the same rate (1.223) shown in the reports of Bayly, Martin & Fay. (Exhibit 11.) (Tr. pp. 167, 172.) This procedure

was followed in the case of each month's gross receipts. When the checking was done and the auditor's reports made out, the auditor's office had in its possession dailies or copies of these policies.

Copies of these auditor's reports (Exhibit 11) went to the cashier of Fidelity and also Bayly, Martin & Fay. The cashier had in his possession the dailies of Policies SPL 20968 and 20950 since early October, 1946. (Tr. p. 194.) The checks of Bayly, Martin & Fay covering the premium figured on the basis of 1.223, were received by the cashier and deposited. No protest, question or objection was raised by Fidelity or Bayly, Martin & Fay. (Tr. pp. 289, 290.) It was not until April 19, 1947, that a claim was asserted by Fidelity for additional premium. This was the first time that Cantlen ever heard of such a claim. (Tr. p. 275.)

The conduct of Fidelity in accepting and checking reports of earned premium at the rate of approximately one-half of that now asserted; actually making out its own reports upon such basis; accepting and retaining without protest or objection payments made upon said basis, is wholly irreconcilable with the theory of plaintiff's case. Likewise, is the conduct of Bayly, Martin & Fay. This insurance coverage had been the subject of extensive negotiations locally and with the home office, and it is just incredible that either Fidelity or Bayly, Martin & Fay could have acted as they did, if the understanding or intent had been that the policies sued upon were effective.

It is the practice of the cashier's office of Fidelity to make out ledger cards covering policies, as soon as issued. (Tr. pp. 191, 195.) Mr. Rechnagel, cashier of plaintiff, at the request of plaintiff's counsel, produced ledger cards dated February 15, 1947 (five and one-half months after it is contended these policies became effective). (Tr. p. 191.) These cards are part of Exhibit 14. They show that the rate of premium on Policies SPL 20968 and 20950 is not 2.20, but 1.223. It was not until May 1, 1947 (shortly after the plan to assert a claim for additional premium was first formulated) that new ledger cards (cards 5 and 6) were made out and upon which the premium rates contained in Policies 20968 and 20950 were used, as if they were guaranteed rates and entirely disconnected with a retrospective rating plan. (Tr. p. 195.) Again, conduct of plaintiff that cannot be explained and wholly inconsistent with its claim.

Under date of November 1, 1946, ledger cards (Exhibit H) were made (only produced at the demand of the plaintiff's counsel) purporting to show deposit premiums called for by Policies 20968 and 20950. In some strange manner, that the cashier could not explain, an entirely different deposit premium was shown than set forth in the policies. (Tr. p. 217.) It was admitted that no deposit premium had ever been billed or collected, although it was the practice to bill and collect deposit premiums as soon as policies became effective. (Tr. p. 190.) The cards were made out and held in abeyance until the policies should become

effective by acceptance and execution of the retrospective agreement; events that never occurred.

In the case of all policies calling for a premium based on gross receipts of the insured, it is customary for insurer to make a final audit to determine that full and accurate reports of gross receipts have been submitted. (Tr. p. 298.) The final audit by Fidelity of defendants' gross receipts for the period September 1, 1946 to January 21, 1947, was made by plaintiff's auditing department April 2, 1947. (Tr. p. 153.) It was not until after this final audit that plaintiff or any department of plaintiff ever considered making a charge under these policies. It was then, for the first time, that there was written on the auditor's report (Exhibit 12) and in handwriting not identified the words: "Assured refused to sign retrospective agreement, retrospective rate not to be used." (Tr. p. 179.) The notation assumes that because the assured had refused to sign the retrospective agreement, execution of which had been demanded, the company could simply disregard that part of its offer, and collect from the assured on the theory and basis that the company had offered and the assured had accepted the policies on a guaranteed basis.

Based upon the final audit, audit statements, dated April 19, 1947 (Exhibit 13, Tr. p. 158), were made out by plaintiff's auditing department, showing additional premium due and copies of this statement were sent to plaintiff's cashier and to Bayly, Martin & Fay. No copy was sent to defendants. There is attached to Ex-

hibit 13 a statement made out by Bayly, Martin & Fay to California Motors for the additional premium. The statement is an original, and was never sent to California Motors. (Tr. pp. 160, 255.)

When Bayly, Martin & Fay received a copy of the statement (Exhibit 13) it not only did not send a copy to or notify the defendants, but disputed and contended with Fidelity that it had no right to demand further premium.

Mr. Cantlen.

“Q. After you received this statement of April 19, 1947, did you take the matter up with Fidelity & Casualty Company?

A. Yes.

Q. With whom did you take it up?

A. I took it up with, first Mr. Mettalia.

Q. Did you tell him that, in your opinion, the company wasn't justified in claiming additional premium?

A. I told him that I did not believe that they were entitled to the 2.20 rate on the earned premium developed, or, in the gross receipts report.

Q. What was your full conversation with him pertaining to that?

A. I contended that the rate was excessive, in other words, *they were charging this earned premium on a guaranteed basis*, and that I could not—the assured never agreed to pay 2.20 on a *guaranteed basis*, and I felt that the rate was excessive on the *guaranteed basis*. Mr. Mettalia contended that the company *would not have issued the policy at the lower rate on a guaranteed basis*,

and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of 2.20.

Q. Did you thereafter take the matter up with any one of the company, other than Mr. Mettalia?

A. Yes.

Q. Did you tell him anything in addition to that?

A. Well, I made the same contention as I made to Mr. Mettalia, and *I did not agree or ever felt that they were entitled to charge on a guaranteed basis rate, the rate that was proposed on a retrospective basis.*" (Tr. pp. 276-277.)

We emphasize the significance of these statements. Defendants never agreed to pay 2.20 on a guaranteed basis. Cantlen never recommended or suggested such a rate. Mettalia did not contend that the policies were in effect or that they were issued on a guaranteed basis, but sought to justify the demand on the ground that *if* the company had issued policies on a guaranteed basis it would have insisted on a 2.20 rate. Mr. Cantlen's testimony and his recollection of the conversations and statements made by Mr. Mettalia have not been disputed.

It was not until August 6, 1947, that Bayly, Martin & Fay made a bill to defendants for the additional premium demanded by plaintiff. This bill, however, was not sent to defendants. It was held until October 22, 1947. (Tr. pp. 254-255, 277.) At that time Cantlen went out to defendants' place of business and brought with him the two policies, which Bayly, Martin & Fay had retained in its possession all this time and a bill

for the additional premium. Cantlen did not tell defendants to pay the bill, but on the contrary brought with him a form of letter for defendants to write to Bayly, Martin & Fay disputing the charge. Defendants followed Cantlen's instructions and wrote the letter he dictated. This letter is Exhibit 18. (Tr. pp. 277-279.)

Mr. Cantlen was examined pertaining to statements in this letter, of which he was the author, and the following are excerpts from his testimony (Tr. pp. 278-279):

“Q. I call your attention to this paragraph: ‘During the aforementioned period, namely, from September 1, 1946 to January 21, 1947, we attempted through you to negotiate a renewal arrangement with the Fidelity & Casualty Company, but in view of the arrangements which were offered to us we found it inadvisable to continue with this company.’ Is that statement true?

A. Yes.

Q. I call your attention to this statement: ‘At no time did we agree to a rate of \$2.20 as against our former rate of \$1.223.’ Did you draft that statement?

A. Yes.”

It is respectfully submitted that the oral testimony introduced in this case, the documentary evidence and the conduct of the parties clearly demonstrate,

1. These policies were never in effect;
2. They were offered only in conjunction with the retrospective agreement;

3. The insurance was never offered on a 2.20 guaranteed basis and appellant never agreed to pay a 2.20 rate of premium;

4. The arrangement between the parties was that pending negotiations for renewal appellant should be covered at the rates provided for in Policy 1457;

5. No other rates were ever agreed upon.

**THE FILINGS WITH THE INTERSTATE COMMERCE
COMMISSION AND RAILROAD COMMISSION.**

The argument is made, and mention is made in the Memorandum Opinion of the Trial Court, that these policies were in effect, or regarded as in effect, because the number of the primary Policy, SPL20968, was listed with the Interstate Commerce Commission and Public Utilities Commission. The testimony demonstrates that these listings have no significance whatsoever.

It will first be noted that the listing of this policy number occurred on August 27, 1946. (Tr. pp. 84-87.) It was done at the same time that Fidelity issued its binder covering appellant, pending renewal. At the time of these listings negotiations had hardly begun, no policies had been written, and no one had the slightest knowledge whether policies would ever be written.

These are the simple facts: Appellant is a highway carrier and is required to have information of in-

insurance coverage on file with these Regulatory Bodies. When a binder is issued, constituting temporary coverage pending negotiations for issuance of a policy, the practice of the insurance carrier is not to file the details of the binder with the Regulatory Bodies, but to assign a policy number, which will become the number of the new prospective policy, if and when issued. The policy number, so assigned, is listed. This satisfies the requirements of the ICC and Public Utilities Commission and obviates the necessity of re-registering when the renewal policy is issued. The insurance is referred to by a policy number, although there is no policy bearing such a number and the coverage is actually by a binder. It is merely a convenient method of listing and identifying the coverage. The listings having been by a policy number, when the coverage is cancelled, the notice of cancellation naturally refers to the insurance in the same manner in which it was listed, to-wit, by policy number.

The following was testified to by Mettalia.

Direct Examination.

“Q. Now, at the time you issued the binder were there any numbers assigned to the *prospective* new policies?

A. Yes, we had to assign a number to the policy because—to the insured, because of certain federal and state filings we had to make.

Q. What were those filings to be?

A. We had to make a Railroad Commission filing, which is now known as the Public Utilities Commission, and also had to make a filing for the

ICC, because they would immediately stop the operations of the California Motors.

Q. So at the time the binder was issued, following this conversation with Mr. Cantlen and prior to the approval by the Bureau, you did assign policy numbers to these prospective contracts and made the filings with the Railroad Commission and the ICC?

A. Because the binder wouldn't be very much value to an insured without these filings.

Q. By the way, Mr. Mettalia, the filings with the Railroad Commission and the ICC were only as to the primary insurance, isn't that correct?

A. Yes, because that is all they require.

Q. At this time I show you what purports to be a copy of the filing with the Railroad Commission and ask you if it is—if you identify it as such?

A. That is correct.

Q. I notice it carries the stamp of the 'Railroad Commission, State of California August 28, 1946, Transportation Department'. Does that recall to you on or about the date it was filed?

A. Yes, this was filed with the Railroad Commission on August 27, which is the date there, and it was accepted by the Railroad Commission on August 28.

Q. That was before the expiration date?

A. That is correct.

Q. On the then existing Policy SPL-1457?

A. That is correct." (Tr. pp. 84-85.)

Cross-examination.

“Q. Regarding these filings, these filings were filed about August 27, 1946, were they not?

A. That is correct, they were.

Q. They were filed at a time when the binder had been issued to the insured extending 1457, is that correct?

A. Yes. Can I add a little to that?

Q. Yes.

A. *When binders are issued we automatically add these assigned policy numbers to satisfy the ICC and the Railroad Commission. They do not accept them otherwise. If it isn't satisfactory to the ICC file, they are fined \$30 gross on that particular file.*" (Tr. pp. 119-120.)

Mr. Cantlen also testified "It was the customary procedure." (Tr. p. 242.)

From and after August 27, 1946, it was the practice of Fidelity and Bayly, Martin & Fay to refer to the coverage of defendant in the same manner, SPI-20968.

"Q. (Mr. Cantlen). No rate or terms had been agreed upon for that policy?

A. No.

Q. After August 27, 1946, whenever the coverage by Fidelity & Casualty Company of California Motor Transport Company was referred to in any communications between your office and Fidelity & Casualty Company or Fidelity & Casualty Company and your office, was that coverage referred to and identified in the same manner as Policy 20968?

A. My recollection, it was.

Q. It was so referred to?

A. Yes." (Tr. pp. 299-300.)

It is respectfully submitted that the listing of Policy SPL-20968 in August, 1946, and permitting the listing so made to remain until January 21, 1947, do not in the slightest manner or degree indicate that any policy bearing that number was ever actually issued or accepted.

THE BINDER.

Under the date of August 27, 1946, Fidelity issued to defendants a binder. This binder is Exhibit B. (Tr. p. 106.) The binder covers exactly the same risks as were covered by Policy SPL-1457 and recites under "Description of Risk" the following: "Pending renewal of Policy No. SPL-1457." A heading "Estimated Premium" is left blank. The covering note is entitled "Sixty Day Binder No. 126895." The binder states that if the policy is issued, the policy shall supersede the binder and the policy begin on the binder date. If the policy is not issued, the binder may run for allotted term or be cancelled by notice. The following provision of the binder has no application in this case: "A premium charge at the rates and in compliance with the rules of the manual of rates in use by the company when this binder becomes effective will be made for the time this binder is in effect if no policy of insurance in place hereof is issued and accepted by the insured." The coverage in this case is a specially negotiated risk and has nothing to do with the manual of rates. (Tr. pp. 270-271.)

Mr. Cantlen delivered this binder to defendant in conjunction with a letter, which is Exhibit I. (Tr. p. 265.) This letter advises defendant that the binder will constitute the coverage pending negotiations for renewal.

That it was the intent that the binder should constitute the coverage pending renewal is indicated by the following testimony of Mr. Cantlen:

“(Mr. Murman). Q. What did you tell Mr. Mettalia about the insurance when you stated that he said the home office was adamant, that there must be a retrospective plan?

A. I told him that the assured was adverse to that form of plan and that we were still trying to get together rather—this was the latter part of August I told him that the assured disliked the idea of a retrospective plan, in view of the possible penalty, and that we were still trying to get the thing worked out and have a meeting, or have them get together, and he gave me a binder *pending renewal*.

Q. That is Defendants' Exhibit B?

A. Yes.

Q. What, if anything, was said about the filings?

A. And that they would file so that there would be no lapse of coverage.” (Tr. pp. 239-240).

Mr. Cantlen also gave the following testimony (Tr. pp. 264-266):

“Q. At what meeting was it that Mr. Mettalia told you that Fidelity would give you a binder

pending renewal and would file with the ICC and Railroad Commission?

A. To my recollection, that was at a meeting of August 15th.

Q. As nearly as you can recall, were those the words of Mr. Mettalia?

A. I can't recall his exact words, but it is customary in our business that we have extension of coverage pending a renewal, so I undoubtedly requested he issue a binder *pending renewal of the policy* and do the necessary filings with the Commissions."

* * * * *

"Q. Now at the time you received the binder and delivered it to Mr. Coughlin, did you know how long the negotiations for renewal would take?

A. No, I didn't.

* * * * *

Q. The negotiations for the renewal of the policy took a great deal more than sixty days, did they not?

A. Yes."

Over thirty days had expired before the retrospective agreement and policies were received. It was November, after the expiration of the sixty days, according to Mettalia, when Cantlen told him that Coughlin would not sign the retrospective agreement and asked Mettalia to try to work out something on a guaranteed basis. (Tr. p. 127.)

Negotiations continued until cancellation. (Tr. pp. 290-291.) Until that time, Cantlen was endeavoring

to persuade Coughlin to enter into the retrospective agreement. (Tr. p. 332.)

The custom of insurers to issue binders or covering notes "pending renewal" is well established. If no premium is specified it is presumed that the coverage is on the same terms as the policy in force. This is clearly expressed by the District Court of Appeal of California (hearing by Supreme Court denied) in the case of *Globe & Rutgers v. Liberty Bell Insurance Co.*, 16 Cal. App. (2d) 76, 79-80. In that case, as in the case at bar, the binder was for sixty days—*pending renewal*. The Court said:

"A covering note is a contract of present insurance. * * * Appellants contend that there was no consideration for this 'keep covered' contract. The law seems to be well settled that a 'binder' contract or 'keep covered' contract need not express any consideration, there being an implied agreement to pay the usual premium. (Couch on Insurance, sec. 91.) Temporary contracts of this sort are frequently construed by the courts as implying the customary rates, even when no premium is specified in the 'covering note' or 'binding slip'. (*Law v. Northern Assur. Co.*, supra, at p. 403; *J. C. Smith & Wallace Co. v. Prussian Nat. Ins. Co.*, 68 N.J.L. 674 (54 Atl. 458).) It was stipulated that the custom and procedure on the Pacific Coast, in matters of this kind, is that the reinsured company, prior to the expiration of a policy which it anticipates may be renewed, takes the reinsurance certificate to the reinsurer, and requests that the protection and coverage of such reinsurance be extended for a

period of time, so as to enable the reinsured to obtain the renewal of its policy, and such reinsurance certificates as it may desire for the ensuing year. If the reinsurer is agreeable to reinsuring the line and wishes to grant such extension, it marks on said reinsurance certificate the words 'Kept Covered.....days from expiration pending renewal'; *the purpose of such 'keep covered' note being to provide automatic cover for the reinsured under the same terms of the policy in force, pending such time as it is definitely known whether or not such policy will be renewed and the reinsurance offered under the terms of the 'keep covered' note required.*"

Negotiations for renewal continued beyond the sixty days. Nothing further was said or done pertaining to the binder. According to both Mettalia and Cantlen the binder was not formally extended, nor was it cancelled. However, Fidelity threatened cancellation of the coverage unless there was acceptance of the retrospective agreement, and on December 19, 1946 actual notice of cancellation of coverage was given. The sixty days expired October 30, 1946. Thereafter, and until cancellation was effective, the conduct and practices of insurer and insured, reporting, paying and receiving, continued exactly as during the preceding sixty days.

There can be no question but that the binder constituted the contract of insurance for the sixty days for which it was originally written, and that the rate was that of the expiring policy. It is likewise clear

from the testimony and conduct of the parties that after the expiration of the sixty days, continuation of coverage under the former policy was either agreed upon by parol or was implied. An extension by either method is valid, and unless different terms are agreed upon it will be presumed that the terms of the expiring policy will be applicable.

14 *Cal. Jur.* 428;

Gold v. Sun Insurance Co., 73 *Cal.* 216, 218;

Globe & Rutgers v. Liberty Bell Ins. Co., 16 *Cal. App. (2d)* 76, 79-80;

Mallette v. British American Assurance Co. (Md.), 46 *Atl.* 1005:

U. S. Fire Insurance Co. of New York v. Fife, 6 *S.W. (2d)* 211, 214;

15 *A.L.R.* 1016, 1017 (Anno.);

69 *A.L.R.* 572, 573 (Anno.);

92 *A.L.R.* 239 (Anno.).

Let us emphasize that the issue in this case is whether or not these policies (SPL 20968 and 20950) were in effect and binding contracts between September 1, 1946 and January 21, 1947. The action of plaintiff is based upon them. It is alleged and found that these policies constituted the contracts of insurance binding on the insurer and insured from September 1, 1946 until January 21, 1947. If the insurance was under other contract or contracts, whatever their nature or legal basis, the plaintiff is not entitled to recover.

THE SIGNATURE OF MR. DAVIS UPON THE FINAL AUDIT.

C. A. Challburg testified that he went to defendant's place of business on April 2, 1947 to make a final audit. A final audit is made as a matter of course, when insurance is based on gross receipts, to ascertain if receipts reported were accurate. Mr. Challburg testified:

“Q. Was the purpose of your visit to the office of the California Motor Transport Company to check the gross receipts of the California Motor Transport Company from September 1, 1946 until January 21, 1947?

A. Right.

Q. You went down to ascertain whether or not the gross receipts as reported by Bayly, Martin & Fay to Fidelity and Casualty Company, as shown upon Plaintiff's Exhibit 10, were correct?

A. Right.” (Tr. p. 170.)

Mr. Challburg testified that Mr. Davis, the auditor of California Motor, was present when he made the audit. The audit is Exhibit 12. The second page contains the gross receipts and is signed by Mr. Davis. Upon the same sheet is the notation already referred to that the retrospective agreement not having been signed, the retrospective rates were not applicable. We wish to make clear that Davis' approval went exclusively to the figures showing gross receipts, and that the other notations were not upon the document when he appended his signature.

“Q. Were there any extensions or anything upon the document you showed to Mr. Davis other than the gross receipts for his approval?

A. That is all.

Q. The only thing you showed Mr. Davis for his approval were gross receipts whether or not they were correct, as you took them from the books of the California Motor Transport Company?

A. That is right.

Q. And Mr. Davis then appended his signature approving your figures as correct?

A. Yes." (Tr. p. 171.)

MEMORANDUM OPINION OF THE TRIAL COURT.

We shall here only consider those portions of the opinion that bear upon the right of the plaintiff to recover.

The opinion correctly states that "the point to be determined as far as the plaintiff and defendants are concerned, is whether or not there was an effective issuance and delivery of the policies which made them binding upon plaintiff and defendants". The trial Court simply disregards all of the *undisputed* testimony and evidence that the policies were only written and submitted in conjunction with the retrospective agreement, that the agreement was not accepted, and that there never was any meeting of minds. The trial Court states "there is no doubt that the plaintiff considered them in effect." Assuming that plaintiff did consider them in effect (which the testimony and circumstances clearly disprove), this could not convert an offer that had never been accepted into a contract.

The Court makes no mention of the wholly inconsistent conduct of plaintiff, which has been heretofore set forth, except to state that "the fact that no deposit premium was paid and that plaintiff received premiums based on the old rate are not, under the circumstances, inconsistent with the fact that the policies were then in effect." It is difficult to understand what "circumstances" the Court has reference to. It would seem to require a lot of explanatory circumstances to remove these glaring inconsistencies.

The trial Court states that the fact that the policies were considered in effect by plaintiff is shown by the testimony of its officials. It is submitted that the testimony of the officials conclusively demonstrates that the policies were only written and submitted in conjunction with the retrospective agreement and were never offered or authorized to be offered on any other basis. It is stated that the fact that plaintiff considered the policies in effect is shown by the fact that it did not cancel the filings with the Railroad Commission of the State of California and Interstate Commerce Commission. The testimony of plaintiff's officials, and the undisputed fact, is, that the filings with the Commissions were simply of a policy number, which number would be given to any prospective renewal policy that would be issued, and which in the meantime would be a ready method of reference to the insured's coverage. The filings would only be cancelled when the coverage was cancelled. There is no connection between the failure of plaintiff to can-

cel the filings and the effectiveness of the policies. The coverage was cancelled and likewise the filings, when it became finally apparent that the parties could not get together on the renewal policy.

The trial Court also points to the fact that plaintiff defended claims, as evidence that it regarded the policies as in effect. Of course plaintiff defended claims. The defendants paid and the plaintiff accepted for the period from September 1, 1946 to January 21, 1947 premiums at the former rate. Plaintiff was paid and retained \$9131.13.⁴ For at least sixty days from September 1, 1946, the coverage was under the binder. The facts that insurance continued after the sixty days, that premiums continued to be paid and accepted and that claims continued to be accepted and defended, exactly as during the original binder period, do indicate that plaintiff regarded itself as an insurer, but not that it regarded itself as an insurer under these policies.

We submit that there is nothing in the record which supports the trial Court's statement that plaintiff "treated and intended the issuance and delivery of its insurance policies to defendant as effective and binding upon it, even though it had not received from defendants the retrospective agreement *which it was demanding.*" Just how plaintiff could demand the execution of the retrospective agreement as a part of the insurance contracts, and at the same time treat

⁴The losses paid by plaintiff for the same period September 1, 1946 to January 21, 1947, including expenses of litigation, amounted to \$7800.00. (Tr. p. 126.)

and intend that the policies should be effective and binding without the execution of the agreement, is indeed difficult to understand. At no time did plaintiff recede from its demand, at no time did it agree to issue the policies on a guaranteed basis, and at no time did the home office of plaintiff authorize or sanction the issuance of the policies on such a basis. The undisputed testimony is that the policies would not be issued except on a retrospective basis, and that in no event would a guaranteed 2.20 rate be considered by the plaintiff.

The trial Court states that while Cantlen testified that he did not regard the transaction as complete until the retrospective agreement was signed, he also testified that he considered his principal covered by these policies, and his conduct shows that he thought that such was the situation. We have already quoted Cantlen's testimony—definitely to the point that the policies were not considered effective because they were not accepted on the conditions offered. We have also related the conduct of Cantlen. We have shown that he retained the policies; that he did not collect or demand the deposit premiums; that he accepted from defendant premiums at the rate of the expiring policy, broke the rate down, recalculated the amount due and reported and remitted to Fidelity the basis of the former policy; that when the auditor's statement of April 19, 1947 was received, Cantlen did not send same to or notify defendants, but argued with plaintiff and contended that there was no justification to make the additional charge, that it was excessive

and never agreed to; that it was not until October 22, 1947 that he brought out to defendants the policies and the bill of plaintiff rendered in July, 1947, and at the same time brought with him a draft of a letter to be written by defendants denying liability. The trial Court does not mention any of this conduct. It overlooks these most significant facts and points out that Cantlen received a claim from defendant and sent it to plaintiff with a covering memorandum referring to the policies by numbers. (Tr. p. 248.) The trial Court overlooks the fact that this reference to policy numbers, according to Cantlen's own testimony, had not the slightest significance, inasmuch as from August 27, 1946, when the binder was issued, the prospective policies were referred to by these numbers and that the temporary coverage in all intercommunications between Cantlen and Fidelity was referred to by these numbers. (Tr. pp. 299-300.) The trial Court also mentions that in November, 1946, Cantlen advised the American Manganese, a customer of plaintiff (defendant), by letter to the effect that defendants were covered by insurance up to September 1, 1947, which was the expiration date of the policies. It was an ordinary occurrence for a customer to ask verification of the fact that defendants were covered by insurance. Such inquiries were addressed to defendants and as a matter of routine were referred to the broker for reply. The only purpose of Cantlen's letter was to give the assurance to the customer. There was present coverage, in which the customer was interested, and certainly it was un-

necessary and inappropriate for the broker to detail to the customer the pending argument over renewal rates. So far as defendants are concerned, Mr. Davis, the office manager, testified that the writing of such letters by the broker was a routine matter and when copies were received by defendants they were simply filed away by a secretary without his even seeing them. (Tr. pp. 378-380.) It is also mentioned that Cantlen sent to plaintiff voluntary audits with specific reference to these policies. These voluntary audits (Exhibit 10) were the gross receipts, as reported by defendants, and upon which Cantlen had calculated the earned premium at the combined rate of 1.223. This significant fact the Court does not mention. The reference to the policy numbers in these voluntary audits was nothing more than the accepted manner of identifying the coverage that existed since the issuance of the binder.

The trial Court states:

‘It will serve no purpose to review every item of evidence indicating that both plaintiff and defendants’ agent Cantlen considered that these policies were in effect and superseded the binder. It will suffice to say that they compel the conclusion that these policies became effective even though the retrospective agreement was not executed.’

We have specifically referred to every item of evidence reviewed by the trial Court in its opinion. The trial Court recognizes that the execution of the retrospective agreement was demanded. There is not an

iota of testimony that the demand for execution of the agreement was ever withdrawn. The testimony is undisputed that Cantlen knew and plaintiff knew that defendants would not accept the retrospective agreement. There is not an iota of testimony that plaintiff ever offered these policies on a guaranteed basis or that Cantlen ever agreed to accept them or was ever authorized to accept them on a guaranteed basis. The testimony is the very opposite. How and when could these policies have become effective? Certainly, the trial Court does not indicate how or when this occurred and the record is barren of anything that supports the conclusion that it did occur.

THE ISSUE OF WAIVER AND ESTOPPEL.

The answer of defendant affirmatively pleads the defense of waiver and estoppel. (Tr. pp. 24-26.) It is alleged in part:

“That the action of plaintiff in accepting the reports and premiums forwarded by defendants, clearly indicating, as aforesaid, the estimation of said premiums on the basis of the premium rates provided for in policy SPL 1457, led and induced defendants to believe that they continued to be protected under the terms of said policy SPL 1457 and to be liable for premiums at the rate provided for in said policy SPL 1457 during the period of the negotiations alleged in paragraph II above; that the action of plaintiff has estopped plaintiff from asserting at this time that any new premium rate or any premium rate other than

that provided in policy No. SPL 1457 was in effect and binding upon defendants during the period September 1, 1946 to January 21, 1947."

The conduct of plaintiff lulled defendants into permitting the status to remain and the negotiations to continue. Defendants would never have agreed to pay a 2.20 rate and the negotiations would have promptly terminated if the claim for such a rate had been known.

Bayly, Martin & Fay was the broker for defendants and constituted their agent to place the insurance. However, Bayly, Martin & Fay acted as the agent of plaintiff for the collection of premiums, and the acts of Bayly, Martin & Fay in accepting from defendants the reports and remittances for premiums were the acts of the plaintiff. Mr. Rechnagel testified (Tr. p. 189):

"Q. Is the broker authorized by the company, your company, to make the collections in its behalf and then remit to the company?

A. The broker is authorized.

Q. The broker makes the collection on your behalf?

A. That is right."

* * * * *

"Mr. Cantlen

Q. Was it the arrangement between Bayly, Martin & Fay and Fidelity & Casualty Company that Bayly, Martin & Fay should collect the premium from the California Motor Transport

Company and remit it to the Fidelity & Casualty Company?

A. That is correct." (Tr. p. 285.)

It is the general rule that an insurance broker acts for the insured for the purpose of making the application and procuring the policy, and for the insurer for the purpose of collecting and delivery the policy.

2 Couch, Sec. 452, 1297;

Globe & R. F. Ins. Co. v. Lerher W. & Co., 215 N.Y.S. 225;

Newark Fire Ins. Co. v. Sammons, 110 Ill. 166.

The evidence is without contradiction that reports were regularly made and premiums regularly paid to Bayly, Martin & Fay and accepted by Bayly, Martin & Fay at the prior rate. (Tr. pp. 281-284.) The insured was thereby induced to rely upon the correctness of its remittances and not to place the insurance elsewhere. Upon general principles of waiver and estoppel such acceptance without protest or objection bars the right of any further demand.

American Eagle Fire Ins. Co. v. McKinnon (Ariz.), 286 Pac. 183;

Arendt v. North American Life Ins. Co. (Neb.), 187 N.W. 65.

The trial Court failed to find upon this issue of waiver and estoppel. This was a material issue and the failure to find thereon constitutes reversible error.

Lowe v. Pierce, 76 Cal. App. (2d) 316;

Hagge v. Drew, 73 Cal. App. (2d) 739.

ARGUMENT AS TO LIABILITY OF
THIRD PARTY DEFENDANT.

We have thus far been considering the judgment in favor of plaintiff. If a liability does exist (which we earnestly contend is not the fact) from defendants to plaintiff, then that liability could only have arisen by wrongful and unauthorized action by Bayly, Martin & Fay. The third party complaint asserts a right of defendant to judgment against Bayly, Martin & Fay for any amount for which defendants may be held liable to plaintiff. The trial Court, although finding in favor of plaintiff, also found in favor of the third party defendant. From this judgment defendants have also appealed.

The following facts are admitted or are uncontradicted:

1. Defendants never authorized Bayly, Martin & Fay to accept insurance policies bearing a 2.20 rate of premium and Bayly, Martin & Fay knew it had no such authorization.

2. Bayly, Martin & Fay received the policies on October 1st or 2nd, 1946 and retained them in its possession until October 22, 1947.

3. When delivering the binder to defendants Bayly, Martin & Fay represented in writing that the binder would constitute defendants' insurance coverage, pending renewal.

4. When receiving a copy of plaintiff's audit (Exhibit 13) about April 19, 1947, indicating a demand for additional premium, Bayly, Martin &

Fay did not notify the defendants. It deliberately concealed the fact of such demand until October 22, 1947.

IF BAYLY, MARTIN & FAY ACCEPTED ON BEHALF OF DEFENDANTS POLICIES CALLING FOR A 2.20 GUARANTEED RATE OF PREMIUM, IT WAS WITHOUT AUTHORIZATION.

If these policies were accepted, it could only have been by act of Bayly, Martin & Fay. All of the negotiations were between plaintiff and Bayly, Martin & Fay. There were absolutely no communications between defendants and plaintiff. The policies were delivered to Bayly, Martin & Fay and it retained possession of them.

If Bayly, Martin & Fay was not authorized to accept policies bearing a guaranteed 2.20 rate of premium, then its acceptance of them on behalf of defendants was a breach of duty for which it is liable.

Cantlen knew that he had no right to accept a policy with a guaranteed rate of premium unless defendants agreed to such rate:

“A. I explained to Mr. Coughlin that Fidelity & Casualty Company still were insisting upon the retrospective plan of insurance and that I was still unsuccessful in having them consider a guaranteed cost plan, and that we were continuing to attempt to secure or locate another market to offer to him, and continue our efforts with Fidelity & Casualty Company to have them reconsider the writing of it on a guaranteed cost plan, the rate to be agreed upon.” (Tr. p. 242.)

Bayly, Martin & Fay had acted as broker for defendants since 1941, and in all instances defendants' approval was obtained before any policy of insurance was accepted. (Tr. pp. 306-308.)

It is undisputed that defendants did not agree to accept a policy with a 2.20 rate and that Cantlen knew that defendants would not accept such a rate.

“Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of \$2.20 as compared with the rate of 1.223, which he had been paying?

A. No, he did not.” (Tr. p. 272.)

Cantlen dictated Exhibit 18, the letter of defendants to Bayly, Martin & Fay denying liability.

“Q. I call your attention to this statement: ‘At no time did we agree to a rate of \$2.20 as against our former rate of 1.223’. Did you draft that statement?

A. That is true.

Q. Is that statement true?

A. Yes.” (Tr. p. 279.)

The rate of 2.20 was never even mentioned to Coughlin.

“Q. So that, although the exact amount of \$2.20 was never mentioned, there was conversation about the rate increase?

A. Correct.” (Tr. p. 294.)

The most conclusive testimony that defendants never agreed to a 2.20 rate, and that Cantlen knew that they had not so agreed, is the following:

“Q. Did you have any subsequent conversations with Mr. Coughlin on this matter, that is, in the next few days, before the cancellation?

A. Yes, on, I would say, the 17th of January, or the 16th, I had a further meeting with Mr. Mettalia, and I asked him if he thought that *if I could get a firm order from the assured for a guaranteed cost plan at a rate*, would he submit it to New York for their approval. * * * Mr. Mettalia told me he would submit it, but he held little, if any, hope that they would consider it. I then went to Mr. Coughlin's office and asked him if he would give me a firm order at a rate of 1.75, that I would like to submit it on the firm basis to Fidelity & Casualty Company, and at that time he told me that he had subscribed or entered into the agreement with the Transport Insurance Exchange and they were to take over the insurance as of the effective date of the cancellation of the Fidelity & Casualty Company.” (Tr. p. 335.)

In other words, on January 16th or 17th, 1947, Cantlen was trying to get Coughlin to submit a firm order of a 1.75 guaranteed rate. It is perfectly obvious

1. That Cantlen knew that he had to have express authorization or order before he could submit any proposition on behalf of defendants;
2. No prior authorization or order at any rate had been received by him.

If Bayly, Martin & Fay accepted these policies, it did so without authority, was guilty of a clear breach of duty, and is responsible for such damages as its unauthorized action caused its principal.

“If a broker performs unauthorized acts, in the course of his agency, he is liable to his principal for the loss or damage which results therefrom”.

12 *C.J.S.* p. 94;

L. Reed Mfg. Co. v. Worts, 187 Ill. 378, 385.

**THE RETENTION OF THE POLICIES WAS A BREACH OF DUTY
BOTH AT COMMON LAW AND ACCORDING TO STATUTE.**

If these policies were effective, it was the broker's positive duty to deliver them to the assured. In this it failed. Bayly, Martin & Fay held these policies from October 2, 1946 until October 22, 1947. It did not even show the policies to defendants. (Tr. pp. 243, 252, 253, 272.) Cantlen was not even sure he told defendants that he had received any policies. He “thinks” he told Coughlin he had received policies when he submitted to Coughlin the retrospective agreement. (Tr. p. 272.) This was positively denied by Coughlin.

“Q. Did Mr. Cantlen ever tell you he had any policy or policies in his possession that he had received from Fidelity & Casualty Company at the same time he received the retrospective agreement?

A. Not at that time, no, sir.

Q. Was the first time you heard of any policy the time Mr. Cantlen came out with the policies to the office on October 22, 1947?

A. It was either October or November when he came to see Mr. Davis, that is right.

Q. 1947, October or November?

A. That is right.” (Tr. pp. 405-406.)

It is the practice of Bayly, Martin & Fay to deliver the policies to the insured as soon as they are issued and checked. (Tr. p. 273.) In the case of defendants, it had previously been the practice of Bayly, Martin & Fay to send the renewal policy before the existing policy expired. (Tr. p. 341.)

Section 383.5 of the Insurance Code of California provides as follows:

“(Delivery.) The original or a true copy of such document shall be delivered to each owner. Where it is executed by an insurer, the insurer shall deliver the original or a true copy:

(a) To the agent or broker who negotiated the insurance, for delivery to each owner of the motor vehicle, or

(b) To each owner of the motor vehicle.

The agent or broker receiving such original or copy shall deliver one to each owner. * * *

(Violation of section.) The licenses of any agent or broker found by the commissioner after hearing to have violated this section may be suspended or revoked in accordance with the procedure provided in Section 1731, or the certificate of authority of any insurer found by the commissioner after hearing to have violated this section may be suspended or revoked in accordance with the procedure provided in Section 704.

(Purpose.) The purpose of this section is to prevent fraud or mistake in connection with the transaction of insurance covering motor vehicles and in furtherance of that purpose the commissioner may make reasonable rules and regulations therefor.”

If these policies were accepted, it could only have been because Bayly, Martin & Fay, as the agent of defendants, retained possession of them and did not return them to plaintiff. If so, the retention of the policies by Bayly, Martin & Fay, and failure to deliver same to the defendants, was the direct cause of defendants' liability, and for the resulting loss the broker or agent is responsible.

BAYLY, MARTIN & FAY GUILTY OF CONCEALMENT.

The answer of third party defendant admits the duties of the agent to the principal; admits that it was the duty of said third party defendant as agent and broker of third party plaintiffs, to notify third party plaintiffs of the receipt and acceptance by third party defendant of said Policies SPL 20950 and SPL 20968 and to disclose to third party plaintiffs, as the principals of third party defendant, the fact of receipt and acceptance and particularly to notify said third party plaintiffs that said policies contain provisions for increased premium rate as specified hereinbefore, and to disclose said material fact to third party plaintiffs as the principals of third party defendant.

It is respectfully submitted that these duties were not complied with by third party defendant.

In addition to retention of the policies and failure to even show them to the insured, Bayly, Martin & Fay committed the following additional breaches of

duty and good faith. It failed to notify defendants when a demand was asserted by plaintiff for additional premium on or about April 19, 1947, and deliberately concealed from defendants the fact of such additional demand and claim until October 22, 1947. It collected premiums from defendants and failed to promptly remit same to the plaintiff. It definitely informed defendants that the binder would constitute its coverage "pending renewal" and thereby induced defendants to rely upon such information. It accepted monthly reports and remittances of premiums from defendants on the basis of the former policy, all without protest or objection, and thereby led defendants to believe and act upon the assumption that such was in fact the rate of premium.

MEMORANDUM OPINION OF THE TRIAL COURT.

We shall now advert to that portion of the Memorandum Opinion bearing upon the liability of third party defendant.

The trial Court failed to even consider the primary question: Did third party defendant accept the policies so as to make same binding upon defendants without authorization?

The Court states that because the binder recites that it is for sixty days, it is impossible to believe that defendants could have believed that the binder was in effect after that period. We wonder what insured, if given a binder by his broker and if told by

the broker that the binder delivered will constitute his policy and coverage pending negotiations for renewal, would read the binder to ascertain its terms and not depend upon the representations of his agent. If the insured did read the binder and did observe that it was written for sixty days, would he not leave the details of its extension to the agent and depend upon the agent to obtain necessary extensions? Certainly, an agent is not relieved of responsibility for a misrepresentation on the theory that his principal has the duty to read the document and thereby ascertain that his statement is false.

The Court states that defendants knew, or should have known, of the delivery of the policies to their agent. This is a remarkable statement. How could defendants have known? If the agent received policies, it was its positive legal duty to deliver them to the insured. Were defendants to presume that this duty had been violated and were they charged with the duty of exercising some mysterious power of intuition?

The Court states that "the documentary evidence and the circumstances show that defendants knew, or should have known, they were covered not by the binder, but by the policy." The Court ignores all of the undisputed evidence, which absolutely disproves such a conclusion: The written statement of the broker already referred to that the binder would constitute defendants' policy pending renewal; the information from the agent that plaintiff would only consider the issuance of renewal policies on a retrospective basis; the submission of the retrospective

agreement without any policy; the agent's statement that plaintiff positively refused to consider a guaranteed rate of premium; the repeated acceptance by third party defendant and plaintiff without protest or objection of premiums reported and paid at the rate of the former policy; the failure to receive or be shown any policies.

The following is what the Court points to in support of the conclusion that defendants knew or should have known that they were covered by these policies: The Court states that being experienced, Coughlin knew that he could not operate without insurance and therefore must have inquired and known that these policies had been issued. This is a *non sequitur*. Coughlin knew that he had to have insurance. He had to have insurance from September 1, 1946, and his agent told him that he had it. The defendants were covered by the binder and the listings with the Regulatory Bodies followed as a matter of course. The broker was responsible for, and attended to this. With absolutely nothing in the record to support such a conclusion, the Court assumes that Coughlin must have inquired and thereby learned something that it was the positive duty of the agent to fully disclose, and which it failed to disclose. It is suggested that if certain clues had been followed they would have led to a disclosure. The Court overlooks the fact that it is considering the liability of an agent for failure to make disclosure of vitally material facts to his principal. Certainly, an agent cannot be relieved of responsibility for breach of his obligations and duties, by

mere speculation that his principal had means of information if it pursued an inquiry. This is not a case of people dealing at arm's-length.

“A party may rely on another's representations without respect to their nature as expressions of opinion and without investigating their truth. where the relation between the parties is confidential. * * * However, the general rule requiring the representee to exercise due diligence, and to avail himself of means of knowledge within reach, does not apply if a relation of trust or confidence exists between the parties, so that one of them places peculiar reliance in the truthworthiness of the other, and in such cases the latter is under a duty to make a full and truthful disclosure of all material facts and is liable for either misrepresentation or concealment.”

37 C.J.S. 282, Sec. 35.

“The contract between plaintiff and defendant created here the relation of principal and agent. * * * The case presented is not one where the parties are to be considered as dealing at arm's-length but one where, because of the existence of a confidential relation, neither party could, without incurring liability therefor, misrepresent to the other any condition which it was important for the other party to be advised of.”

Vance v. Supreme Lodge of the Fraternal Brotherhood, 15 Cal. App. 178, 183.

In the case of *Calmon v. Sarraille*, 142 Cal. 638, the relationship was also that of principal and agent.

“The proposition of the appellant, that inasmuch as the contents of the instrument were open

to the plaintiff equally as to Garnier, and that as they signed it without reading it or having it read to them, they are bound by its terms, is without merit. The case of *Hawkins v. Hawkins*, 50 Cal. 558, cited in support of this proposition, has no application. The rule there laid down is applicable when the parties to the transaction are dealing at arm's-length, but has no application where the relation of trust or confidence exists between them."

The Court next mentions the fact that defendants received a copy of Cantlen's letter to American Manganese Company. Again, the Court reasons that it was the duty of defendant to deduce and discover from a reference to a date of expiration of insurance in this copy of a letter to one of defendant's customers that policies that it had never seen were in force and binding upon it. The Court ignores the most reasonable testimony of defendants that copies of such letters when received were simply filed as a matter of course. The Court overlooks the fact that the agent had a positive and affirmative duty to disclose facts and deliver policies, and that the insured had a right to rely upon the agent performing those duties. The agent is not relieved of that responsibility by discovering clues by which the principal could have discovered that the agent violated its trust.

The Court next states "defendants required plaintiff to defend claims made against them for accidents occurring up to the effective cancellation date, even though some of the claims were not filed until after the defendants had in April, 1947, rejected plaintiff's

claim for premiums figured upon the rates fixed by the policies." Let us examine this statement: Having paid premiums until January 21, 1947, and plaintiff having accepted and retained such premiums, it necessarily follows that defendants would expect plaintiff to take care of claims arising during that period. The Court states that claims were presented "after the defendants had in April, 1947, rejected plaintiff's claim for premiums figured upon the rate fixed by the policies." The Court is referring to plaintiff's audit of April 19, 1947 (Exhibit 11), but the Court overlooks the fact that the copy of the audit showing the additional demand went to Bayly, Martin & Fay, and that Bayly, Martin & Fry deliberately withheld all information pertaining to it from defendants until October 22, 1947; overlooks the fact that upon its receipt Cantlen argued and contended with plaintiff that the demand was unjustified and that this controversy between Cantlen and plaintiff continued until July, 1947; overlooks the fact that Cantlen wrote a letter to defendants on August 7, 1947, advising of the demand and then held it until October 22, 1947.

On the basis of these facts, and none other, so far as there is any specification, the Court concludes that defendants should have known that these policies were issued, delivered and were effective; that they superseded the binder, and that the rates provided for by them were controlling until a retrospective agreement was signed, or the policies were cancelled. We respectfully submit that there is not the slightest basis for such conclusion; there was no manner, without information from the agent, that defendants could

have known that the policies were issued, delivered or effective; no manner in which they could have known that the rates in the policies were controlling until a retrospective agreement was signed or the policies cancelled.

The Court completely ignores the fact that if these policies were accepted, they were accepted without authorization; that if they were effective the agent breached its positive duty in withholding the policies. These breaches cannot be neutralized or avoided by speculating that the principal had available clues by which to discover facts that the agent failed to disclose.

CONCLUSION.

It is respectfully submitted that these policies were never effective; they were issued conditionally and the condition was never fulfilled; there never was any agreement by which they were issued and accepted on a guaranteed basis and exclusive of the retrospective agreement. It is further submitted that if the policies were effective, they could only have become so, by reason of unauthorized acts of Bayly, Martin & Fay, for which the third party defendant is responsible.

Dated, San Francisco, California,
January 29, 1951.

Respectfully submitted,

NORMAN A. EISNER,

Attorney for Appellants.

No. 12,722

United States Court of Appeals
For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK (a corporation),

Appellee.

BRIEF OF APPELLEE
THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

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FILED

MAY 4 1957

P. O'BRIEN,
CLERK

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No. 12,722

United States Court of Appeals For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK (a corporation),

Appellee.

BRIEF OF APPELLEE

THE FIDELITY AND CASUALTY COMPANY OF NEW YORK.

STATEMENT OF THE CASE.

This is a suit on contract involving two insurance policies. Appellants were insured from September 1, 1946, to January 21, 1947. Appellee insurance company contends appellants must pay for this insurance at the rate of \$2.20 per \$100.00 gross earnings as provided in the two new policies. Appellants contend that they have paid at the rate of \$1.223 as provided in a binder because the binder extended the old policy, that expired September 1, 1946. Because appellee believes that the record shows that on the facts there can be no merit to appellants' contentions, and the trial

Court so held, a succinct chronological statement of all the facts should be helpful.

Commencing on September 1, 1941, and continuing on each anniversary date thereafter, appellee insured appellants for more than five consecutive years. From the beginning it was understood that the premium rate depended upon appellants' loss experience. Appellee and appellants' agent, Mr. Cantlen, discussed the premium rate with each renewal and, although the risk was developing adversely, the original premium rate of \$1.223 per \$100.00 of gross earnings remained unchanged until the renewal date in 1946. By that time the risk had risen above the permissible loss ratio to 185% of the earned premiums and appellants were notified that a 75% premium increase was in order. To protect appellants pending the writing of the new insurance, appellee issued appellants a sixty (60) day binder effective September 1, 1946, the expiration date of the old insurance. At the same time, and at appellants' agent's request, appellee made the required legal filings for appellants with the Railroad Commission and I. C. C. stating appellants were covered with the new primary policy No. SPL 20968, so that they could continue their motor transport business uninterrupted.

In the latter part of September, 1946, appellee wrote up and delivered to the agent the two new policies, effective from September 1, 1946, which, accordingly, superseded the binder. The agent knew that the new insurance, evidenced by both the primary policy SPL 20968 and the excess policy SPL 20950, together called

for payment of a total premium at the rate of \$2.20 per \$100.00 of gross earnings subject to final premium audit. At the same time, a proposed retrospective agreement which, even if signed, had no effect on the insurance except as to the rate applicable to the final premium audit of the primary policy at the end of the policy period, was delivered to appellants with the option of signing the same or subjecting the new policies to cancellation should appellee elect so to do. In December, 1946, appellee learned that appellants had definitely decided not to sign the proposed agreement, so appellee elected to give appellants the usual thirty (30) day notices of cancellation, which specifically referred by number to the primary and excess policies which had been issued effective September 1, 1946. Appellee also gave the Railroad Commission and the I. C. C. notices of cancellation specifically referring to the primary policy by number. All the cancellations became effective January 21, 1947.

Immediately upon receiving notices of cancellation and because their agent had tried in vain to place the insurance elsewhere, appellants on their own procured insurance at a "few cents higher" rate through a reciprocal organization of truckers known as the "Transport Insurance Exchange". Following cancellation, appellee completed a final audit of appellants' gross earnings in April, 1947. The audit, covering the period of September 1, 1946, to January 21, 1947, was certified correct by Mr. Davis, appellants' general auditor and assistant secretary. On the final audit as so certified, appeared the number of primary policy

SPL 20968 as well as a notation that appellants had not executed the proposed retrospective agreement so that the effective premium rates were \$2.20 per \$100.00 of gross earnings. Following the final audit, appellee rendered a "bill" to appellants, in the form of statements of adjusted premiums, showing that appellants owed a total earned premium of \$16,973.11 on both policies which, less payments of \$9,131.12 previously made to appellee by appellants on monthly reports voluntarily furnished by appellants after notices of cancellation were received, left a total premium balance of \$7,841.99 due appellee. On October 22, 1947, appellants refused to pay the premium balance of \$7,841.99.

In addition, and from and after September 1, 1946, the effective date of the policies, appellants reported a total of ninety-eight claims to appellee for handling under the two policies which appellee had issued. The record shows that appellants benefited by appellee paying out a total of \$7,800.00 in disposing of these ninety-eight claims. The \$7,800.00 paid out to dispose of these claims, together with additional acquisition costs of 13% of the earned premium plus production costs of 11%, clearly resulted in appellants continuing to be an unprofitable risk for appellee over and above the payments of \$9,131.12 voluntarily made.

Furthermore, after appellants, with full knowledge of appellee's claim, had refused on October 22, 1947, to pay appellee's claim of \$7,841.99 for the balance due on earned premiums as determined by final audit, appellants in December of 1947, referred a new claim

in the form of a lawsuit for \$25,000.00 damages to appellee to defend on behalf of appellants under policies SPL 20968 and SPL 20950. In good faith, and at a cost to appellee in excess of \$1,600 (included in the \$7,800.00 paid out on claims), appellee undertook a successful defense of this lawsuit under the very policies the premium rate of which appellants are now again disputing in refusing to pay the premium balance of \$7,841.99 due appellee since January 21, 1947.

After a full hearing lasting several days, the trial Court determined all conflicts and ruled for appellee, ordering judgment to be entered accordingly upon appropriate findings of fact and conclusions of law. Judgment was thereafter entered in appellee's favor for \$7,841.99, plus interest from October 27, 1947, and costs of \$49.70. The appeal has been taken from this judgment.

**APPELLANT CONTENDS EVIDENCE INSUFFICIENT TO
SUPPORT JUDGMENT IN FAVOR OF APPELLEE.**

Appellants concede that Mr. Cantlen was "their agent" and that "It is undisputed that defendants were covered by insurance by plaintiff from September 1, 1946, until January 21, 1947". (A.O.B. 3, 9.) But, say appellants, "The question is whether or not the two policies sued upon in this action were in effect" since "Plaintiff contends that from September 1, 1946, until January 21, 1947, these new contracts of insurance were in effect" (A.O.B. 9-10). Thus "Appellants are urging, with the utmost seriousness,

that the finding of the trial Court that the policies sued upon were in effect from September 1, 1946, to January 21, 1947, is not supported by the evidence" (A.O.B., 11).

Appellants admit "being well aware of the rule that a judgment will not be disturbed if supported by substantial evidence". (A.O.B., 11.) However, after quoting some favorable fragmentary excerpts from the record, appellant conclude, "How and when could these policies have become effective? Certainly, the trial Court does not indicate how or when this occurred and the record is barren of anything that supports the conclusion that it did occur". (A.O.B., 50.) Nothing could be further from the facts as we shall show!

THE EVIDENCE IS MORE THAN SUFFICIENT.

Since it is undisputed that appellee covered appellants with insurance, there is no issue as to the existence of the contract between the parties. The issue is whether appellants should pay appellee a final audit premium balance of \$7,841.99 computed at the rate of \$2.20 per \$100.00 of appellants' gross earnings in the manner set forth in two new insurance policies which were effective from September 1, 1946, to January 21, 1947, or whether, having voluntarily paid appellee \$9,131.12 computed at a rate of \$1.223 per \$100.00 as set forth in an old policy which had expired September 1, 1946, appellants owe nothing more to appellee. Appellee contends that on the record the

balance due should be paid and the trial Court so held, resolving any conflicts in appellee's favor.

On this issue, the evidence is more than sufficient to show that the broker, Mr. Cantlen, first of Spengler & Johnstone and later of Bayly, Martin & Fay, as appellants' agent and broker, had been handling appellants' insurance account since 1930, when Mr. Coughlin, a man of forty years experience in the "mover transport business", took over control of appellants (R., 227, 306, 400). By 1941, an insurance company then covering appellants "was going to insist on an increase in premium" so Mr. Coughlin asked Mr. Cantlen to interest another company if possible (R. 301-302.) Mr. Cantlen interested appellee who agreed to insure appellants on the condition that the rate could be adjusted annually, depending upon the loss experience, as Mr. Cantlen testified (R. 303-304):

"Q. And what was the offer, if I may call it that, of Fidelity & Casualty Company, at that time, in regard to carrying Coughlin's risk?

A. As I remember, they offered to write the primary at rates of one per cent—one per cent per \$100.00 of gross receipts. I talked with J. L. Culpepper, who is an agency supervisor for Fidelity & Casualty Company, and he agreed to assume the primary of five and ten thousand, property damage of five thousand, at a rate of one per cent, *with the understanding that we would start out at that rating, and from there on the risk would more or less make its own rate, dependent upon the experience.*

* * * * *

Q. You have already stated you told him what the proposal was. What did you say to Coughlin?

A. I told him that the Fidelity & Casualty Company was willing to resume the risk at a rate of one per cent for the primary, and that they would go along with the risk and *adjust the rate annually, dependent on the loss experience*, and we could place the excess at the underwriters at Lloyd's, which would give him a combined rate guaranteed cost of, for that year, of 1.21.

Q. Were policies issued by the F. & C. at that rate and under that understanding?

A. *Yes, they were.*" (Emphasis ours.)

Successively each year thereafter, with that understanding appellants renewed their insurance with appellee. (R. 73-74, 228.) The original rate of \$1.223 per \$100.00 of gross earnings remained unchanged until 1946, although the loss experience gradually became more and more unfavorable. (R. 77, 269, 307-311.) Premium rates were constantly discussed by the parties in light of the mounting unfavorable loss experience. Mr. Mettalia, Casualty Superintendent of appellee, testified (R. 76-77):

"Q. What did Mr. Cantlen say to you at that time and what did you say to him as broker? You don't have to give the exact words, but the substance of the conversation.

A. *Well, we reviewed the losses and it indicated a loss ratio much, very much in excess of what we call a permissible loss ratio. Under the conditions, we needed more money to carry on the following year.*

Q. Did you say that to Mr. Cantlen?

A. Yes, I did.

Q. What did he say?

A. *He had agreed with me that it was definitely developing such a loss ratio that the premium should be increased at renewal.*” (Emphasis ours.)

On April 18, 1946, appellee wrote appellants’ broker that appellants’ account was “costing us money which will be reflected in the premiums”. (R. 230-231.) Appellants’ broker called this to appellants’ attention. (Pl.’s Ex. 15; R. 230.) By July, 1946, losses had risen above the “permissible loss ratio” to 185% during the first half of the 1945-1946 policy year. (Third Party Defendant’s Ex. BB; R. 134.) In other words, apart from additional production and acquisition costs, the total premium income since 1941 had been about \$66,000.00, with total losses from 1941, running appellee in the red at between \$77,000.00 and \$78,000.00. (R. 83.)

Beginning in July, 1946, with a discussion of appellee’s high exposure in the “Peralta Case” (R. 136, 320-321, 342-344, 365-366) and continuing thereafter, the appellants’ broker had numerous talks with the parties as to the unfavorable loss experience which was causing an inevitable increase of about 75% in premium rates for renewal during the 1946-1947 policy period. (R. 74-77, 233-235, 260, 293-294, 319-322.) Appellants’ broker agreed an increase was necessary and that, due to the loss experience, a rate of \$2.20 per \$100.00 gross earnings was reasonable. (R.

78.) In this connection, Mr. Mettalia testified (R. 82-84) :

“Q. What rates did you tell him you were proposing?

A. \$2 for the primary coverage and 20 cents for the excess coverage.

Q. Is that \$2 per \$100 for gross receipts?

A. Yes.

Q. And 20 cents per \$100 gross receipts for the excess?

A. That is correct.

Q. A total premium for its policies of \$2.20 for \$100 gross receipts?

A. That is correct.

Q. You stated that to Mr. Cantlen before the expiration date of SPL-1457?

A. That is correct.

* * * * *

What did Mr. Cantlen say when you gave him those figures?

A. Oh,—

Q. Well, I don't mean exactly. What, in substance, was his reply?

A. That the rate was reasonable because of the past experience and other conditions that arose in the industry as a whole.

* * * * *

Q. Following that conversation, what, if anything, was done about the new policies?

A. We finally agreed on the rates. I submitted my formula to the National Bureau. The policies could not be issued until that approval was forthcoming, so that we had to issue a binder pending the approval of the Bureau, so we proceeded with the binder and then when the Na-

tional Bureau approved the rates, why, we went ahead and issued the policy.” (Emphasis ours.)

On cross-examination, Mr. Mettalia testified as follows (R. 102-103):

“Q. Yes. Well, then, to restate that, *you had an agreement with Mr. Cantlen as to what the premium would be, which was \$2.20, subject to the approval of the National Bureau?*

A. *That is correct.*

* * * * *

Q. I will ask you the question again: *After September 1, did you have any further negotiations with Mr. Cantlen as to what the rate would be during that succeeding year, September 1, 1946, to September 1, 1947?*

A. *No.” (Emphasis ours.)*

As far as appellee was concerned, at no time did appellants instruct their broker not to renew the insurance which appellee was willing to issue at the \$2.20 rate. (R. 139-140, 238, 261.) Furthermore, appellants knew that as of January 1, 1946, there had been a general nationwide insurance rate increase of 33%. (R. 128, 292-293.) They also knew that the rate negotiations ceased when the rates were referred to the National Bureau for approval and, when once approved (Pl.’s Ex. 1; R. 80), the rates couldn’t be changed without further Bureau approval (R. 147-148.) On re-direct examination, Mr. Mettalia testified as follows (R. 143):

“Q. Oh, yes, but between the date you and Mr. Cantlen talked, the time that the bureau approved, and the time that the policies, Plaintiff’s

Exhibits 3 and 4, were written up there was no change?

A. No.

Q. If there was any conversation about this rate, so far as your mentioning the standard rate, that came afterwards?

A. Yes. We would not have any authority to deliver that—we could deliver it, *but wouldn't have any authority to use any other rate other than what we used in this.*

Q. *Which the Bureau approved?*

A. That is correct." (Emphasis ours.)

Lastly, they knew that when the expiring 1945-1946 policy (Defendants' Exhibit A; R. 101) actually expired on September 1, 1946, the needed filings on defendants' behalf with the Railroad Commission and the I.C.C. expired with it unless new insurance was issued. On direct examination of Mr. Cantlen, he testified (R. 240):

"Q. What, if anything, was said about the filings?

A. And that they would file so that there would be no lapse of coverage.

Q. You knew at that time, did you not, that in order to file with the ICC and the Railroad Commission there had to be a policy number filed?

A. That is right."

So when appellee at appellants' request issued a binder to appellant (Defendants' Exhibit B; R. 106), pending the writing of policies SPL 20968 and SPL 20950 to take the place of old policy which expired on September 1, 1946, appellee again at appellants' broker's request and with his knowledge filed the

necessary insurance coverage of the primary policy SPL 20968 for appellant with the Railroad Commission (Plaintiff's Exhibit 2; R. 86) and I.C.C., all before September 1, 1946, so that appellants could continue on uninterrupted after September 1, 1946, with their motor transport business (R. 84-87, 111-113, 264, 269, 299, 328, 348, 382-383.) Thus from and after September 1, 1946, the new policies were in existence but not yet actually written up. Mr. Cantlen so testified on cross-examination (R. 299):

“Q. Well, the binder was issued on August 27, 1946, wasn't it?

A. Yes.

Q. The notification was given to the Interstate Commerce Commission and the Railroad Commission prior to August 27th, 1946, pertaining to coverage of the California Motor Transport Company?

A. Correct.

Q. In those notices, the Railroad Commission and Interstate Commerce Commission, prior to August 27th, 1946, the notification stated that the coverage was reflected by Policies 20950 and 20968.

Mr. Murman. I think just 20968.

Q. (by Mr. Eisner). All right; 20968, is that it?

A. Yes.

Q. At that time, no policy 20968 was in existence?

A. *Well, it was in existence but not written.*”
(Emphasis ours.)

The filings were reported by appellants' broker to appellants when he delivered the binder to Mr. Cough-

lin who later confessed knowing, although he didn't read the binder, that "the binder gives you coverage until a policy is issued". Mr. Cantlen testified on direct examination (R. 241-242):

"Q. Where did you deliver the binder to him?

A. At his office.

* * * * *

Q. Did you tell him about the company taking care of the filings that we have mentioned?

A. To my best recollection, I did.

Q. You did? And what did he say as to that?

A. There was no particular comment. It was the customary procedure." (Emphasis ours.)

As to the binder itself, Mr. Coughlin testified on cross-examination (R. 347):

"Q. Do you know what a binder is?

A. Well, I do and I don't, I suppose.

Q. In any event, you did not read that document which you have in your hand?

A. I did not, but I do know a binder gives you coverage until a policy is issued." (Emphasis ours.)

Also, as soon as appellee made the necessary filings so that appellants could continue to operate, appellee had every right to believe and did believe that appellants had accepted the new insurance. On cross-examination Mr. Mettalia testified (R. 119):

"Q. Did Mr. Cantlen accept these policies without the signing or execution of the retrospective agreement?

A. Not only did Mr. Cantlen accept them, but the insured accepted them.

Q. Why do you say the insured accepted them?

A. Because there is an ICC and Railroad Commission filing. If he didn't accept them, he couldn't operate and the ICC and Railroad Commission file would have immediately pulled him off the road." (Emphasis ours.)

Thereafter the insurance contract between the parties was always referred to or identified by the new policy numbers, SPL 20968 and SPL 20950. At the end of his cross-examination, Mr. Cantlen testified (R. 299-300):

"Q. After August 27th, 1946, whenever the coverage by Fidelity & Casualty Company of California Motor Transport Company was referred to in any communications between your office and Fidelity & Casualty Company or Fidelity & Casualty Company and your office, was that coverage referred to or identified in the same manner as Policy 20968?

A. My recollection, it was.

Q. It was so referred to?

A. Yes.

Mr. Eisner. That is all."

The new policies (Plaintiff's Exhibits 3 and 4; R. 88-89) replacing the binder, were issued for one year from September 1, 1946, and, as written, were delivered the latter part of September to appellants' broker with a proposed retrospective agreement, their broker telling Mr. Coughlin that appellee "insisted upon the declaration of the policies" (R. 88-91, 106-107, 140, 266, 290.) On direct examination Mr. Cantlen testified (R. 244):

“Q. When did you say the declaration of the policies, what do you mean by that? I mean, that is a little unusual phrase.

A. Well, in the business, you might carry the business under a binder, and the declaration of *the policy is declared on writing of the actual contracts.*

Q. The writing of the actual contract is in the paragraph here where binders is referred to, is that correct, in reference to the policies being issued, *they would supercede the binders?*

A. *That is right.*” (Emphasis ours.)

Not before then had appellee required appellants to sign the retrospective agreement, although it clearly was not a condition to the insurance becoming effective since, if signed, it only applied to the final audit premium rate appellants were to pay appellee at the end of the policy period. On cross-examination Mr. Mettalia testified (R. 107, 118-119):

“Q. And you requested that the insured sign this retrospective agreement as a condition to the policies becoming effective, did you not?

A. No, absolutely not.

* * * * *

Q. No, do you mean to say, then, that these policies were in effect without the signing of this retrospective agreement?

A. Absolutely, yes, sir.

Q. Did you so tell Mr. Cantlen?

A. Yes.”

It must be noted in passing that with conspicuous and continuous lack of success, appellants' broker, at their insistence, tried in vain throughout the time in

question to interest many other old line insurance companies in insuring appellants but the broker was unable to find a single company "that would take the risk at a more attractive basis than the Fidelity and Casualty were offering" (R. 237, 242-245, 325-328, 333.) Despite that and in accordance with appellee's understanding, appellants' broker himself testified that "negotiations closed with the Fidelity and Casualty as of September 24, the issuance of the policies". In this connection, Mr. Cantlen testified on cross-examination (R. 266):

"Q. Did you say anything to Mr. Mettalia or Mr. O'Malley, or anyone else connected with the Fidelity pertaining to an extension of time on the binder?

A. No.

Q. Why not?

A. *Because the binder was replaced by policies as issued.*

* * * * *

Q. Your negotiations for renewal, you say, extended over the sixty-day period?

A. Well, they were still—now, the *negotiations closed with the Fidelity & Casualty as of September 24th, the issuance of the policy.*" (Emphasis ours.)

Thus the proposed retrospective agreement which, if signed, would have had no effect on the issuance of insurance, affecting only the applicable rate on the final premium audit of the primary policy SPL 20968, was left by appellants' broker with Mr. Coughlin "to look them over" (R. 244, 327.) As a matter of fact, Mr. Coughlin, as in the case of the binder that was

given him to read and later on the letters and policies themselves, confessed that he "never read it all the time it was in my office" although he was the one and only person who made the decisions as to the appellants' insurance. In this connection, Mr. Coughlin testified (R. 400, 409, 355):

"Q. Mr. Coughlin, you are president of the California Motor Transport Company?

A. I am.

Q. How long have you been president of that company?

A. Since 1930.

Q. How many years' experience have you had in the mover transport business?

A. About 40 years.

Q. Do you personally handle the insurance coverage by the California Motor Transport Company and its affiliates?

A. I do.

* * * * *

Q. But at that time you did know about the \$2.20 rate?

A. *No, I didn't look at the policy.* The policy was delivered to us on that particular date. I didn't look at it.

Q. Did you know about the letter Mr. Davis wrote in answer to the Cantlen letter transmitting the policy?

A. Yes, I did. I saw that letter, the letter to Bailey, Martin & Fay, and Mr. Cantlen told me what it called for, and I said, 'I have no objection'. He asked me if I would object to Mr. Davis writing it and I said no.

Q. *Did you subsequently read it over after it was written?*

A. *No sir, I had left.*

Q. Did you ever look at it after it was written?

A. No.

Q. You don't know today what is in it except what you may look at it now, is that right?

A. That is right.

* * * * *

Q. Now, Mr. Coughlin, I call your attention to the first page of that document (the retrospective agreement) that was handed you at the time, and observe that it refers to a particular policy number SPL 20968. Did you observe that at the time?

A. No, sir, never observed at any time. In fact, *I never read it all the time it was in my office.*" (Insertion and emphasis ours.)

Appellants' broker, who had accepted the policies from appellee and who had seen the \$2.20 rate specified therein, retained possession of the policies for appellants, so informing the appellants who, in turn, knew that insurance from and after September 1, 1946, was absolutely necessary (Third Party Defendant's Exhibit PP; R. 330) in order to carry on their transport business without interruption (R. 118, 253, 272, 294.) In this connection, Mr. Coughlin testified (R. 348, 349-350):

"Q. Do I understand it is necessary in your business for you to have insurance, that is, necessary by reason of the rules of the ICC and Public Utilities Commission?

A. Yes.

Q. And also, I assume, without insurance, you risk catastrophe, that is accidents. You were aware of that risk, I assume?

A. *Yes, indeed*, but we had no trouble placing insurance.

* * * * *

Q. *Are you familiar with the fact that certain of the customers or clients, or whatever you call them, that you serve, require certificates showing you are insured?* You are familiar with that fact, are you?

A. *Yes, I am.*

Q. I hand you Third Party Defendants' Exhibit PP, letter November 18, 1946, with reference to the American Manganese Steel Division, certificate of insurance. You observe that is a letter to the American Manganese Steel Division?

A. Yes.

Q. Attached to it is a letter from you.

The Court. That is Exhibit what?

Mr. St. Clair. Exhibit PP, Your Honor.

A. Yes.

Q. I will refer you to the letter, a carbon of which went to the California Motor Transport Company, Ltd., and call your attention to the fact that the statement in there is that your insurance expired September 1st, 1947. Do you see that statement in the letter?

A. Yes, I do. I didn't receive this letter.

Q. Did anyone in your organization?

A. I suppose Mr. Davis did. I didn't receive it.

Q. Did Mr. Davis call this letter to your attention?

A. Not that I recall.

Q. Was it your routine in details of insurance, is Mr. Davis the man that would do that insurance business?

A. Majority, yes.

Q. Though you had handled the broad company policy?

A. Yes.

Q. Mr. Davis didn't call your attention to this remark that your insurance ran out September 1st, 1947?

A. Not to my knowledge, no." (Emphasis ours.)

As to the American Manganese letter, Mr. Davis, appellants' general auditor and assistant secretary, testified (R. 378):

"Q. Now, I want to show you this Exhibit 'PP', which has been shown to Mr. Coughlin here. Here it is.

The Court. That is the Manganese letter, written in July, 1946, I think.

Mr. St. Clair. November of 1946, Your Honor.

Q. (by Mr. Eisner). Now, Mr. Davis, did you handle this correspondence pertaining to this American Manganese Company?

A. Yes, sir.

Q. *Well, do requests frequently come from customers or shippers to receive corroboration of your insurance coverage?*

A. *Yes, I get any number of them over a period of a year.*

Q. What is your practice with reference to them? What do you do with them?

A. I write a letter to the firm giving the inquiry relative to our insurance. I mean, *I write a letter to our insurance broker transmitting the letter from the shipper or consignee and asking that they favor the firm with a letter direct, answering the inquiry, and letting me have a copy*

for my file so that I know that it was attended to.” (Emphasis ours.)

Following appellee’s request that appellants sign the proposed retrospective agreement (Third Party Defendants’ Exhibit QQ; R. 331), their broker advised appellee that appellants refused to sign the same (R. 108-109, 332-333.) So appellee elected to cancel the insurance. (Third Party Defendant’s Exhibit RR; Plaintiff’s Exhibits 5-8; R. 93-95, 332.) But it was not cancelled at appellants’ request nor solely because appellants refused to sign the proposed retrospective agreement (R. 109.) Appellants had also refused to renew certain fidelity bonds as originally agreed upon (Plaintiff’s Exhibit 8; Third Party Defendant’s Exhibit RR; R. 95, 332) when appellee had renewed the insurance, on a rate based on an over-all volume of business with the appellants which included the fidelity bonds, with the hope that appellee could “get out of the red” that way on appellants’ unfavorable loss experience. On cross-examination Mr. Metalia testified (R. 110):

“Q. As I understand it, then, the meaning of that language is that the Fidelity and Casualty Company had hoped to receive the bond business from the insured, is that right?

A. In other words, we had hoped to get out of the red. We had lost.

Q. *Did the fact that you did not receive the bond business have anything to do with the cancellation?*

A. *Yes, partly.”* (Emphasis ours.)

Thus the insurance was cancelled for more than one good reason (R. 110-111.) So, not being able to interest any other company, appellants entered into a reciprocal agreement (Third Party Defendant's Exhibits SS-1, 2, 3 and 4; R. 358-359) with the Transport Insurance Exchange, calling for a retrospective type of premium at a rate "a few cents higher" to be effective as of January 21, 1947, the date of cancellation of appellee's two policies (R. 335, 361-365, 407.) On December 19, 1946, appellants' broker received copies of appellee's cancellation notices which, as stated before, were effective January 21, 1947 (Plaintiff's Exhibits 5 and 6; R. 93.) Appellants' broker discussed with appellants the implications of the cancellation notices. On direct examination Mr. Mettalia testified (R. 92):

"Q. Are you referring to the beginning of the period or the end of the period?

A. Both. I mean, the policy was effective September 1, 1946, and expired September 1, 1947.

Q. Would there be any way that that policy, that policy period would be shortened?

A. Only by a cancellation notice or by endorsement, which must be acknowledged by the insured. That is the only two ways I know of, or if the policy is returned for cancellation.

Q. Were either of those two ways followed in this particular case?

A. Yes.

Q. Which of the two?

A. We sent out cancellation notices."

In this connection, Mr. Cantlen testified on direct examination (R. 253):

“Q. Now, Mr. Cantlen, did you receive a cancellation notice that the company sent out in connection with these policies?

A. We received a copy of it.

Q. You received a copy? Did you deliver the copy to the assured or discuss the copy with the assured at all?

A. Yes, after they were served, we discussed it, and there was thirty days for it to become effective.”

Undoubtedly appellants were aware that notices of cancellation were also filed by appellee with the Railroad Commission and the I.C.C., also effective on January 21, 1947 (Plaintiff's Exhibits 7 and 8; R. 94-95.) It should be noted in passing that the parties understood that no cancellation notice of the binder had been necessary since it had been superseded by the policies which were issued effective September 1, 1946 (R. 114, 346-347.)

At various stages during the trial of the case, appellants' attorney attempted to make something of the fact that the deposit premiums set forth in the policies were never paid by appellants. The record shows that the cancellation notices were issued by appellee and received by appellants before the delinquent deposit premiums were actually in default so as to permit appellee to enforce collection and, furthermore, the cancellation notices were received before appellants' broker had remitted to appellee any of the

premium payments due to appellee from appellants as called for by the monthly report or voluntary audits, subsequently submitted to appellee by appellants' broker. Mr. Rechnagel, appellee's cashier, testified on cross-examination (R. 208):

"Q. Then I ask you, so far as the deposit premium that was referred to is concerned, so far as your department is concerned, that wasn't yet in default, is that correct, that is, in December?

A. That is right.

Q. *At the time you knew the policy was canceled, then and under your practice, that premium was not in default?*

A. That is right."

On re-direct examination, Mr. Rechnagel testified (R. 212):

"Q. You said that there were no deposit premiums collected. I believe you said that in answer to one of Mr. Eisner's questions?

A. That is right.

Q. Also, in answer to Mr. St. Clair's question you said that cancellation notices had been sent out December 17, 1946?

A. I think that was the date, yes, sir.

Q. *The deposit premiums were not in default on that date?*

A. *That is correct.*

Q. Does that explain why they were not collected?

A. So far as my records are concerned, yes."

On re-cross examination, Mr. Rechnagel testified (R. 214):

“A. Well, we expect our agents to pay us their premiums when they collect them. However, they do not become overdue for 60 to 90 days. When I say ‘60 to 90 days’, I mean this: *The September item actually has to be marked off my books on December 31, either by payment or cancellation.*

Q. (by Mr. Eisner.) You recognize the propriety of the payee, the party to whom the payment has been made, to retain the money for that length of time.

A. Yes, sir.”

On further re-direct examination, Mr. Rechnagel testified (R. 222):

“Q. So that in this case the premium, then, went on your books as a premium that was to be paid you on December 1, something that had to be paid between that date and December 31?

A. That is right.

Q. *It would only be after December 31 you would attempt collection measures, is that correct?*

A. *That is right.*

Q. *In the meantime the notice of cancellation went out?*

A. *That is right.*

Mr. Murman. I have no further questions.”
(Emphasis ours.)

Except for the deposit premiums, all remittances to appellee made by appellants were made after the policies were actually canceled on January 21, 1947, and one at least even after the final premium audit had been completed. In this connection, Mr. Cantlen testified on re-direct examination (R. 296-297):

“Q. The cancellation which took place, as evidenced by Plaintiff’s Exhibits 5 and 6, that took place before any remittances by you to the company on the basis of these reports or voluntary audits, isn’t that correct?

A. That is correct.

Q. And it was after the cancellation notices that you did make those remittances?

A. That is correct.

Q. And I believe some of them were made even after the date of the cancellation, isn’t that correct?

A. Yes.”

As to the monthly reports which appellee received from appellants’ broker after the cancellation became effective, the evidence shows that each of such reports was sent in by appellants to their broker with appellants’ covering checks as a routine procedure and generally about thirty days late (R. 250.) Each of these same reports was in turn broken down by appellants’ broker and then forwarded by him to appellee (Plaintiff’s Exhibit 10; R. 149), who receive them with appellants’ broker’s covering check, which as to all reports totalled \$9,131.12, or the amounts which appellants admit paying to appellee (R. 163-166, 181-184, 203-206, 250-252.) Also, it should be noted that these reports were “sent in with specific reference to the new policies 20950 and 20968” during the time that appellants’ broker had such policies in his possession with knowledge of the earned premium rate to be used on final audit in the amount of \$2.20 for \$100.00 of appellants’ gross earnings, and that furthermore such reports so sent in were subject to the final

premium audit. Mr. Challburg, appellee's auditor, testified on direct examination (R. 150, 151, 152):

"Q. Did the audit statement you made up confirm these gross receipts reports as being correct?

A. Well, except that was a voluntary, subject to final audit."

* * * * *

"Q. I note, Mr. Challburg, that whereas there are five gross receipts reports, there are only four audit reports. Can you explain that?

A. The last one of the reports wasn't billed due to the fact that it is taken care of in the final audit."

* * * * *

"Q. (by Mr. Murman). Mr. Challburg, did you make a final audit in this particular case involving these defendants in connection with Policy No. SPL-20950 and SPL-20968?

A. I did."

In this connection, Mr. Cantlen testified on re-direct examination (R. 296):

"Q. Now, on these voluntary audits that you developed through processing the defendants' reports to you concerning gross earnings and premiums which they calculated had been earned on those gross earnings, *those voluntary audits were again sent in with specific reference to the policies 20950 and 20968, isn't that correct?*

A. *That is right.*

Q. *At that time you had the policies in your possession?*

A. *That is right.*

Q. You had examined and seen an endorsement in them regarding rates, isn't that correct?

A. That is right.

Q. *And you also knew, did you not, Mr. Cantlen, that these reports were subject to final audit, as you have stated?*

A. *Yes.*" (Emphasis ours.)

Appellee received all of these reports with the same understanding, namely, that all of them were subject to final premium audit. On cross-examination, Mr. Challburg testified (R. 167, 174-175):

"Q. Do you mean to say, Mr. Challburg, no one in your department, when the statement is received of gross receipts showing the rate of premium that is figured upon the gross receipts, checks the rate and premium to see whether it is correct?

A. Not until the final audit."

* * * * *

"A. They are checked, as I say, in the final audit.

Q. Special audit is made, we will say, months after the time these reports are received. Do you mean to say in the meantime there is no check made of them?

A. Not until final audit is made."

Consequently, appellee contends, and the trial court concurs, that by sending in the monthly reports to appellee who received them, they are in no way binding on appellee as to the actual balance due appellee on the earned premium which was to be determined only by the final premium audit actually made by appellee after the insurance terminated.

The final premium audit which was actually made by appellee was not peculiar to this case. Appellants'

broker testified that in all previous policies there were in each case final audits by appellee with a final adjustment of premium after the terms of each of the previous policies had expired (R. 78, 221-222.) This was the expected procedure (R. 298.) Furthermore, both of the policies, SPL 20968 and SPL 20950 (Plaintiff's Exhibits 3 and 4; R. 88-89), show on their face and clearly state in the conditions thereof that upon termination of the policies the earned premium shall be computed by final audit and in this connection appellee shall be permitted to inspect, examine and audit appellants' books insofar as they relate to the premium basis or the subject matter of the insurance in order that a proper premium adjustment may be made as soon as practicable after the time the cancellation becomes effective (R. 89.) The testimony shows that the final audit is made not only to develop the final earned premium as such, but also to correct any mistakes in the monthly reports or voluntary audits submitted by appellants as well as to pick up all exposures to risk entertained by appellants during the policy period in order to make the final audit premium correct in all respects. On cross-examination Mr. Mettalia testified (R. 105):

“A. A contract of this type, as we had it before, is a broad form liability policy, and it is based on certain exposures that are developed at the time we issue the contract. When an auditor goes to make an audit, the meaning of that audit is to pick up the payrolls, receipts, and any other exposures that the insured may have entertained during that period. If I may explain further,

your Honor, by this I mean if he decides to buy a hotel, we pick up that exposure because he is automatically covered under the original contract. That is part of what the auditor does when he goes out to make that audit, and that is in the provisions of the contract.

Q. Then the purpose is, Mr. Mettalia, to ascertain what are the gross receipts from any source of the insured to which the premium should be applied at the rate specified in the policy, is that correct?

A. That is correct." (Emphasis ours.)

On cross-examination Mr. Rechnagel testified (R. 195, 213):

"Q. Your department then simply accepted the statement of the auditing department as correct?

A. That is right, because if there is any mistake that would be picked up by the final audit, you see."

* * * * *

"Q. Just a moment Mr. Rechnagel, do you mean to say that you wait until the final audit, which in this instance was in April of 1947, before a check is made to see whether or not the insured has reported his premium at the proper rate?

A. Yes."

The final premium audit (Plaintiff's Exhibit 12; R. 154) which appellee made covered both the policies which had been issued effective September 1, 1946, being made in April, 1947, at appellants' offices in the presence of their general auditor, Mr. Davis, who

certified to the same. Mr. Challburg, appellee's auditor, testified (R. 152-153, 154):

"Q. I show you, Mr. Challburg, what purports to be an audit made by you in response to a payroll audit requisition, and ask you to state whether or not those documents constitute the audit, the final audit made by you.

A. That is right.

Q. *And in whose presence, can you state, was the audit made?*

A. *Mr. Davis.*

Q. *As one of the California Motor Transport, he signed, did he, in your presence?*

A. *That is right.*

Q. His signature appears right on there?

A. Yes.

Q. There is a date on there of April 2, 1949?

A. That is right.

Q. Is that the date he signed?

A. That is the date the audit was made."

* * * * *

"The Court. Is that the one signed by Mr. Davis?

Mr. Murman. Yes, your Honor, the first sheet is signed by Mr. Challburg. The entire audit is signed by Mr. Davis covering both policies." (Emphasis ours.)

On direct examination, Mr. Davis, appellants' auditor testified (R. 375, 376-377):

"Q. Mr. Davis, I call your attention to the following words written upon the page of the Exhibit which bears your signature, 'Assured refused to sign retrospective agreements. Retro-

spective rates not to be used.' Were those words upon that Exhibit when you signed your approval or certified to the correctness of the audited figures?

Mr. Murman. I object to that on the ground it is an attempt to vary a written instrument."

* * * * *

"The Court. Overrule the objection, for the reason I have just stated.

Mr. Murman. Yes, Your Honor.

The Court. That came up on your direct case.

A. You asked me——

Q. (by Mr. Eisner.) If the writing which appears on that page that bears your signature and which I have just read to you was upon that page, according to your best recollection, at the time that signature was appended?

A. I couldn't say. I couldn't say if it was there or not.

Q. You have no recollection?

A. No.

Mr. Murman. That wasn't his testimony. He said he couldn't say. It isn't that he had no recollection, he said he couldn't say.

Mr. Eisner. I am asking him if he has any recollection.

The Court. I wrote down, 'I can't say whether it is there or not.'

Mr. Murman. That is exactly what he said.

The Court. That is what you said, isn't it?

A. That is what I said."

On cross-examination, Mr. Davis testified (R. 383-384):

“Q. Coming back to this Exhibit ‘10’, Plaintiff’s Exhibit ‘10’, which was the final audit, you recall——

A. I recall the Exhibit.

Q. Mr. Eisner read you some language and you said you didn’t recall whether it was on there at all at the time you signed. He didn’t read this, and I will ask you whether this language was on there at the time you signed: ‘Rates of 150-BI, 50-PD, rates of 15-BI, 05-PD, (given to me by underwriting department):’ Was that on there at the time you signed it?

A. I couldn’t say if it was or not.

Q. To the best of your recollection?

A. I just couldn’t say. The only thing I would be interested in there was any difference in gross receipts.

Q. There is quite a space, Mr. Davis, from the top of the page where these audits as to gross receipts end, and the bottom where you signed. Don’t you have any recollection as to whether there was writing in between there?

A. I don’t know. Three years is a long time ago.

Q. Did you note at the bottom here whether ‘California Motor Transport Company’ was written opposite ‘insured’?

A. No, I can’t say that I noted that.

Q. How about policy numbers SPL-20950? Did you know whether that was on there?

A. No, I didn’t. I don’t recollect what was on there. I know when they come in it is a matter of determination of proper report and gross receipts during the period, and the policy number wouldn’t mean anything, or anything else. If

there are any discrepancies in the amount between our report and the amount of final audit, the Auditor would call it to my attention. We have any number of them.

Q. *However, your signature is opposite the word 'Certified by——'.*

A. *William J. Davis.*" (Emphasis ours.)

In this connection, it should be noted that the audit stated on its face that the applicable rates for the insurance were \$2.20, that "assured refused to sign retrospective agreement—retrospective rates not to be used", that the final premium audit was made without reference to the unsigned proposed retrospective agreement and that based on the premium rates set forth in the policies, appellants owed a total premium balance to appellee of \$7,841.99 (Plaintiff's Exhibit 14; R. 188), being the total premium balance due appellee on both policies (R. 154-156, 187-188.) Voluntary payments totaling \$9,131.12 made to appellee by appellants' broker at appellants' request after the policies were cancelled and prior to appellants being billed (Plaintiff's Exhibit 14; R. 188), had nothing to do with the balance of the premium due appellee as shown by the final audit which was arrived at by subtracting the total voluntary payments of \$9,131.12 from the total earned premium as developed by the final audit, or \$16,973.11, leaving a balance due appellee of \$7,841.99 (Plaintiff's Exhibit 15; R. 158, 211-212.)

"Bills" in the form of statements of adjusted premiums were sent to appellants' broker (Plaintiff's

Exhibit 13; R. 156-160, 210-211.) The premium rates were the same as those shown in the policies. The broker in turn made up his own bills which he subsequently delivered to appellants (R. 224-225.) Before doing that, and during discussions with appellee following the final premium audit, the broker was clearly told by appellee "that the company would not have issued the policies at a lower rate on a guaranteed basis, and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of \$2.20" (R. 276, 336.) Thus the bills made up by appellants' broker were delivered to appellants with the policies in October, 1947, although the covering letter signed by appellants' broker (Plaintiff's Exhibit 17; R. 255) is dated August 7, 1947 and states that because the proposed retrospective agreement was not signed and entered into "it is not applicable" to the balance of \$7,841.99 due appellee by appellants on the final audit premium (R. 256.) On the date of delivery to appellants, October 22, 1947, appellants, in writing, declined payment of the balance due appellee (Plaintiff's Exhibit 18; R. 257.) Thereupon appellee placed the balance due in "suspense" on November 7, 1947 (Plaintiff's Exhibit 14; R. 188), and through appellants' broker demanded full payment from appellants on November 12, 1947 (Plaintiff's Exhibit 19; R. 258.) When payment was not forthcoming from appellants the matter was referred to appellee's attorneys for collection (R. 226.)

Concurrently with the development of the facts as to the issuance of the insurance, the writing of the

policies, the rejection of the proposed retrospective agreement by appellant and the subsequent refusal of appellants to pay the balance due appellee on the final premium audit, numerous claims were filed with appellee by appellants under the two new policies for handling throughout this entire period and even after appellants' final refusal to pay the premium balance due appellee.

Appellants' broker testified that under the system of reporting claims which appellant and their broker had in effect, appellants reported their claims (Plaintiff's Exhibit 9; R. 99) directly to appellee for handling (R. 245-247.) Thus, on and after September 1, 1946, appellants reported ninety-eight claims to appellee for handling under the two new policies issued as of that date and appellee paid out about \$7,800.00 of its own money in disposing of such claims (R. 96-99, 125-126, 381.) This sum of \$7,800.00 which appellee paid out in servicing the insurance which it had issued to appellants was only one of three major business costs to appellee which appellee undertook in the handling of appellants' insurance risk, the other costs being production costs of 13% of the total premium income together with acquisition costs of 10% to 11%. In this connection Mr. Mettalia testified on re-direct examination (R. 142):

“Q. So this \$7800 is just one of three?”

A. That is only attorney or legal expenses in connection with claims. In addition to that you have production cost, which averages about 13 to 14 per cent.

Q. Of what?

A. *Of a dollar income. Then you have acquisition cost, which is based on about 11 per cent, 10 per cent. I think in this case our production cost was about 13 per cent.*

Q. *Of each dollar that the company took in?*

A. *That is correct.*'' (Emphasis ours.)

In making reports to appellee, appellants used regular forms approved by the National Bureau with policy numbers appearing on the forms in some cases, although not always (R. 120-122.) In the case of one accident which occurred on October 26, 1946, (Plaintiff's Exhibit 16; R. 248), a complaint was actually served on the appellants who in turn forwarded it to their broker for transmittal to appellee for handling "under policies No. SPL 20968 and SPL 20950". During his direct examination Mr. Cantlen testified (R. 248):

"Q. I thought you said it had gone through your office?

A. I said we had knowledge of it because the complaint was served on the assured, which in turn forwarded it to us, to our office, and transmitted it to the insurance company.

Q. *It was transmitted by you to the insurance company under Policy No. SPL-20968 and SPL-20950, is that correct?*

A. *That is correct.*

Q. *Those are the policies in question in this case?*

A. *That is right.*'' (Emphasis ours.)

This appellants' broker did because the broker expected appellee to handle appellants' claims under the two new policies which had been issued effective September 1, 1946, even though the proposed retrospective agreement bearing only on the final premium audit hadn't yet been signed by appellants. Mr. Cantlen testified on re-direct examination (R. 295-296):

"Q. Now, I believe you testified, Mr. Cantlen, that during this period of time you referred to the company for handling a claim, which was identified as Plaintiff's Exhibit 16, referring specifically to the portion setting forth the rates that we have been talking about, *and you did that irrespective of the fact that the retrospective agreement had not yet been signed, isn't that correct?*

A. *That is right.*

Q. *In other words, you expected the company to handle this claim, even though it was claimed the defendants in this case hadn't signed the retrospective agreement, is that right?*

A. *That is right.*

Q. And that is one of the exhibits you said you had not yourself forwarded but that went directly from the defendants to the plaintiff, or was *sent in to the plaintiff for handling, even though there had been no signing on the retrospective agreement, is that correct?*

A. *That is right.*" (Emphasis ours.)

As indicated above, and after appellants clearly knew appellee's position as to the balance due on the earned premium as developed by the final audit, appellee received a summons and complaint from appel-

lants on December 4, 1947, almost a year after the policies had been cancelled, relating to an accident which had involved one of appellants' drivers, a man by the name of Murphy, and had occurred in November, 1946, but which was not reported to appellee for investigation or for any other purpose until summons was served on appellants over a year later (Plaintiff's Exhibit 9; R. 99, 388-389.) In this connection, the record shows that Mr. Davis, appellants' general auditor who had certified to the correctness of the final audit which was made at the premium rate of \$2.20 and without reference to the unsigned retrospective agreement, was himself served with process as an officer of appellants, being assistant secretary thereof as well as general auditor, and he testified that he subsequently appeared as a witness on behalf of appellants at the trial (R. 388-389.) This claim reported by appellants after they knew that appellee was claiming \$7,841.99 as a premium balance due on the very policies which they were asking appellee to act under, involved a personal injury action claiming damages totaling \$25,000.00 which appellee, upon receiving the summons and complaint, thereafter in good faith successfully defended (Plaintiff's Exhibit 20; R. 390) at a total defense expense to plaintiff of \$1,671.77, getting what is called "a defendant's result" (R. 99, 390.) This, despite the fact that on October 22, 1947, appellants had knowingly and unequivocally declined any responsibility for the balance due appellee on the earned premiums developed by the final audit. In this connection Mr. Davis, assistant

secretary and general auditor of appellants, testified (R. 388) :

“Q. Well, there is a notation by the F. & C. showing the date of accident, November 19, 1946, and reported to the company on December 4, 1947, over a year afterwards.

A. Well, as I say, I don't recall. I was probably served the papers in this matter. I do recall the case very well. We were, as the case developed, we were improperly made a party to that suit and it wound up by us being declared non-suit against the company.

Q. *Well, when you got the papers, you referred them to the F. & C. for defense, did you not?*

A. *That is correct.*

Q. *And the F. & C. defended you, did they not?*

A. *Yes, that is correct.*

Q. *Through their lawyers?*

A. *Yes.”* (Emphasis ours.)

Briefly, and quite apart from the facts relating to the insurance itself, it is appellee's contention that by referring claims to appellee, and particularly the claim embodied in the lawsuit which developed almost a year after the policies were cancelled, appellants affirmed and ratified the acts of their agent, Mr. Cantlen, and are now bound to appellee to pay the balance due on the final premium audit.

ARGUMENT.

The Court below accepted appellee's contention that a valid contract of insurance existed between the parties until the same was cancelled by appellee in accordance with the policy provisions thereof. By accepting all the benefits of the insurance, appellants are charged with the burdens they assumed under the policies and more particularly are obligated to pay appellee the balance of \$7,841.99, with interest, due on the full earned premium of \$16,973.11 as determined by the final audit. Apart from the foregoing, appellants, after declining to pay appellee the balance due on the earned premium as determined by final audit and with full knowledge of appellee's claim for the same, referred a new lawsuit to appellee to defend under the very policies appellants were disputing. Appellee undertook this defense with success and got a "defendant's result." Thus, in addition to accepting the benefits during the life of the policies, appellants, after cancellation thereof and refusal to pay the premium balance, affirmed and ratified their broker's acts.

I.**FINDINGS AND JUDGMENT SUPPORTED BY
SUBSTANTIAL EVIDENCE.**

Because the error specified is that of insufficiency of the evidence to support certain findings favorable to appellee and because appellants asserted that evidence is lacking to support the judgment in appellee's

favor, appellee has detailed the evidence hereinabove with some care to demonstrate that the findings and judgment are amply supported by more than substantial evidence. Thus, the trial Court actually had no alternative but to rule in appellee's favor (R. 50-54) and thereafter find, among other things, that (R. 55-61):

“FINDINGS OF FACT

(1) All of the allegations of plaintiff's complaint are true and correct.

* * * * *

(9) At all times mentioned in said third party complaint, said third party defendant was the duly appointed and acting, and was acting as agent and broker for the placing and maintenance of casualty insurance, including comprehensive, public liability and property damage insurance, for and on behalf of defendants and third party plaintiffs.

* * * * *

(11) On or about September 1, 1946, at the request of defendants and third party plaintiffs, and each of them, in San Francisco, California, plaintiff made, executed and issued to said defendants and third party plaintiffs its written contract of primary casualty insurance known as 'Comprehensive General — Automobile,' Policy No. SPL 20968, which said policy was filed with the Railroad Commission of California, Transportation Department, Truck and Stage Division, wherein and whereby plaintiff insured defendants and third party plaintiffs, and each of them, for one year * * * at the premium rate of \$2.00 per \$100.00 of gross earnings of each of said

defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at said rate at the end of said policy period.

(12) Also at the request of said defendants and third party plaintiffs, and each of them, plaintiff then and there made, executed and issued to said defendants and third party plaintiffs its written contract of casualty insurance known as 'Comprehensive General — Automobile,' Policy No. SPL 20950, which said policy was issued solely as excess insurance over the primary insurance provided for in said Policy No. SPL 20968, insuring said defendants and third party plaintiffs, and each of them, for one year * * * at the premium rate of \$.20 per \$100.00 of gross earnings of each of said defendants and third party plaintiffs during the policy period, said gross earnings being subject to final audit by plaintiff at the end of said policy period.

(13) Thereafter plaintiff delivered said policies to third party defendant, the agent of defendants and third party plaintiffs, and each of them, following which said defendants and third party plaintiffs reported claims and lawsuits under said policies to plaintiff, and pursuant to voluntary audit each month of said defendants and third party plaintiffs, said defendants and third party plaintiffs remitted monthly premium payments to plaintiff, said payments being received by plaintiff on account of the total earned premium and subject to final audit by plaintiff at said rates at the end of said period of said policies.

(14) On or about December 19, 1946, plaintiff, pursuant to the terms of said policies, caused written notices of cancellation of said policies to be mailed to defendants and third party plaintiffs, and each of them, at the address shown on said policies, stating that said cancellation was effective more than five days thereafter, to-wit, on January 21, 1947.

* * * * *

(16) Subsequent to said cancellation, and as soon as possible thereafter, plaintiff caused the total earned premiums on said policies for the period from September 1, 1946, to January 21, 1947, to be computed by final audit at said rates totaling \$2.20 per \$100.00 of gross earnings of defendants and third party plaintiffs, said premiums so computed being in the total sum of \$16,973.12, leaving an unpaid balance of said total earned premiums in the sum of \$7,841.99 due plaintiff from defendants and third party plaintiffs, and each of them.

(17) On October 27, 1949, plaintiff made demand on defendants and third party plaintiffs, and each of them, for said unpaid balance, and no part of said unpaid balance of said total earned premiums has been paid by said defendants and third party plaintiffs."

No other findings were proposed by appellants! No conclusions of law different than those reached by the Court below were urged! There was no motion for new trial! Why? Because after four days trial and the consideration of lengthy oral argument and briefs, the filing of which delayed submitting the case to the

trial Court for weeks, appellants knew there were no other proper findings that could be proposed in an attempt to urge the Court to arrive at different conclusions than those reached. A new trial on any grounds was out of the question where, on a record of compelling evidence, such as we have here, only insufficiency of the evidence is now specified on appeal as error.

Appellants concede that the "judgment will not be disturbed if supported by substantial evidence." (A. O.B., 11.) Thus, since the findings are amply supported by substantial evidence, with all conflicts resolved in favor of appellee, the judgment must be affirmed (*Dynamic Air Eng. v. Western D. & M. Corp.*, 101 A.C.A. 881, 882; *Security-First Nat. Bank v. Walters*, 101 A.C.A. 883, 887.) As was said in *Richter v. Walker*, 36 A.C. 597, at page 603:

"And, of course, as to the sufficiency of evidence to support findings, it is the time honored rule that all substantial conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the findings if possible."

II.

SINCE POLICIES WERE IN EFFECT ENTITLING APPELLEE TO THE PREMIUMS CLAIMED, THE BINDER HAS NOTHING TO DO WITH APPELLEE'S CLAIM.

Appellants' main contention is that the two policies in question never became effective. Yet appel-

lants concede they "were covered by insurance" issued by appellee. (A.O.B., 9.) The question then arose as to what insurance it could be if it wasn't that evidenced by the new policies 20950 and 20968 (Plaintiff's Exhibits 3 and 4; R. 88-89). Appellants attempted to answer this by asserting that their own agent told them "that the binder would constitute coverage pending negotiations for renewal at the rate of the expiring policy" and thus the insurance was being carried under the binder with negotiations pending right up until appellee cancelled out. Thus, argued appellants, the premium rate was 1.223, as set forth in the old policy which expired on September 1, 1946, rather than 2.20 as set forth in the new policies 20950 and 20968 which were *issued* after September 1, 1946. Appellants' views are not in accord with the facts prior to the controversy arising between the parties.

In a word, the record does not bear appellants out. Mr. Coughlan, a man of forty years experience in the "mover transport business" (R. 400) and the man who, as president of appellants, personally made the decisions as to all the insurance problems of appellants (R. 346, 400), testified (R. 346-347):

"Q. You will recall you testified that Mr. Cantlen, around August 27th, delivered to you a binder, copy of which I now hand you, Defendants' Exhibit B, your own exhibit. Do you recall that testimony on your part?

A. Yes, I do. He handed me this, together with a letter.

Q. That is correct. At that time, *did you read this document* which you now have in your hand—copy of which you now have in your hand?

A. No, sir.

Q. You had been handling insurance for a long period of time?

A. Yes, sir.

Q. *Do you know what a binder is?*

A. Well, I do and I don't, I suppose.

Q. In any event, you did not read that document which you have in your hand?

A. I did not, but *I do know a binder gives you coverage until a policy is issued.*" (Emphasis ours.)

The binder (Defendants' Exhibit B; R. 106) which Mr. Coughlan admits he didn't read contains the same thought expressed substantially in the same language used by Mr. Coughlan and emphasized above, in that the binder provided that for a period of sixty days appellee binds insurance pending renewal, but that "the policy *issued* shall supersede this binder." It is undisputed that this was the understanding of the parties who at the same time knew that the new policies (Plaintiff's Exhibits 3 and 4; R. 88-89) *when issued* actually replaced the binder for a term of one year from and after September 1, 1946. Thus, Mr. Mettalia, Casualty Superintendent for appellee, testified (R. 87-88, 91):

"Q. What if anything did you do after you received the Bureau approval?

A. We proceeded with the issuance of the policies.

* * * * *

Q. Now, Mr. Mettalia, as to Plaintiff's Exhibits 3 and 4, the policies in question, there appears on the face of each that the policy period is from September 1, 1946 to September 1, 1947. Can you state whether or not there was any different policy period than that appearing on the face of these contracts?

A. No, there wasn't.

Q. Are you referring to the beginning of the period of the end of the period?

A. Both. I mean, the policy was effective September 1, 1946, and expired September 1, 1947."

On this same subject, Mr. Cantlen, appellants' agent, testified (R. 244, 266):

"Q. When you say the declaration of the policies, what do you mean by that? I mean, that is a little unusual phrase.

A. Well, in the business, you might carry the business under a binder, and the declaration of the policy is declared on writing of the actual contracts.

Q. The writing of the actual contract is in the paragraph here where binders is referred to, is that correct, in reference to the *policies being issued, they would supersede the binders?*

A. *That is right.*

* * * * *

Q. Did you say anything to Mr. Mettalia or Mr. O'Malley, or anyone else connected with the Fidelity pertaining to an extension of time on the binder?

A. No.

Q. Why not?

A. *Because the binder was replaced by policies as issued.*" (Emphasis ours.)

Thus, it should be clear that the insurance coverage which appellants admit existed all during the time in question was evidenced by the policies (Plaintiff's Exhibits 3 and 4; R. 88-89) *which were issued to replace the binder*. These policies provide for the 2.20 rate which appellee contends is the rate in suing for the balance due on the premiums. Consequently, by their own admissions, appellants have shown that the binder is no defense to appellee's claim. The Court below, in its opinion, so held (R. 52, 53):

"I find under the evidence that defendants claim that they thought that the binder covered them until negotiations were completed is not supported by the evidence. Their chief official had the binder delivered to him. He says he did not read it. This binder provided that it would expire in sixty days and that when the policies were issued they would supersede the binder. This is so explicit in the binder that it is impossible for me to find that defendants could have believed that the binder was in effect after the sixty-day period.

* * * * *

These and other facts and circumstances brought out by the evidence support the conclusion that the defendants knew, or should have known that the binder expired at the end of sixty days; that the policies had been issued, delivered, and were effective; that they had superseded the binder; and that the rates provided for by them were controlling until a retrospective agreement was signed, or the policies were cancelled."

III.

THE RETROSPECTIVE AGREEMENT HAS NOTHING TO DO
WITH APPELLEE'S CLAIM.

Appellants assert that "the policies were only offered in conjunction with the retrospective agreement" and thus were only to become effective if such retrospective agreement was signed by appellants. (A.O.B. 12-25.) Again, another contention of appellants does not find support in the record. Mr. Mettalia testified (R. 107, 118-119):

"Q. (by Mr. Eisner). Now, Mr. Mettalia, you presented this retrospective agreement and the two policies to Mr. Cantlen at one time, did you not?

A. I believe so.

Q. And you requested that the insured sign this retrospective agreement as a condition to the policies becoming effective, did you not?

A. *No, absolutely not.*

* * * * *

Q. Now, do you mean to say, then, that these policies were in effect without the signing of this retrospective agreement?

A. *Absolutely, yes, sir.*

Q. Did you so tell Mr. Cantlen?

A. Yes.

Q. Did Mr. Cantlen accept these policies without the signing or execution of the retrospective agreement?

A. *Not only did Mr. Cantlen accept them, but the insured accepted them.*

Q. Why do you say the insured accepted them?

A. Because there is an ICC and Railroad Commission filing. If he didn't accept them, he

couldn't operate and the ICC and Railroad Commission would have immediately pulled him off the road." (Emphasis ours.)

On this same subject, Mr. Cantlen testified (R. 252-253, 272, 293-294):

"Q. Now, Mr. Cantlen, after you received the policies from the Fidelity and Casualty people, did you show them to Mr. Coughlin?

A. No.

Q. At the time you had this discussion with him early in October, as you stated, concerning the company wanting the policies to be declared, you had them in your possession then?

A. They were in my office.

Q. You didn't take them over to Mr. Coughlin, though?

A. No.

Q. Did you tell him you had them in your office?

A. I believe so.

* * * * *

Q. Are you sure that you even told Mr. Coughlin that any policies had been received by you from Fidelity?

A. Yes, I am quite sure.

* * * * *

Q. So that you, at that time, knew something concerning the increase in rates that they were contemplating?

A. I felt there would be an increase.

Q. You stated that to Mr. Coughlin, did you not?

A. Yes.

Q. So that, although the exact amount of 2.20 was never mentioned, there was conversation about a rate increase?

A. Correct.

Q. Did you want to look at this? I interrupted you. This is Plaintiff's Exhibit 1, regarding the rate.

A. I don't see that this has any bearing.

Q. When you got the policies, Plaintiff's Exhibits 3 and 4, 20968 and 20950, *did you look through them at all, read them over, examine them?*

A. *Oh, yes.*

Q. Did you look at the portion of them that sets up the rate for the particular policy?

A. Yes.

Q. *Did you notice that for Policy No. 20968, which is Plaintiff's Exhibit 3, there was set forth therein on Endorsement No. 7 that the rate per hundred dollars of gross earnings was \$2.00, final rate to be determined by audit?*

A. *Yes.*

Q. This policy was in your possession, I think you said, the latter part of December, 1946?

A. That is right.

Q. *Did you also notice a similar endorsement in No. 20968 where the rate was to be twenty cents for the excess—*

A. *Yes.*" (Emphasis ours.)

In view of the foregoing, appellee urges that the unexecuted retrospective agreement can be of no evidentiary value in this lawsuit since it never bound the parties and clearly, whether executed or not, was not intended as a condition to the effectiveness of the insurance which appellants concede covered them for all purposes. These purposes included specific refer-

ences made to the two new policies in the filings with the I.C.C. and the Railroad Commission as well as in the insurance certificates issued to their customers. Also ninety-eight claims were settled by appellee paying out a total sum of \$7800 under the provisions of the two policies in question. The Court below so held (R. 50-51) :

“There is no doubt that the policies were made out and delivered to the agent of the insured within the sixty-day period provided in the binder. There is no doubt that the plaintiff considered them in effect. This is shown not only by the testimony of its officials, but by the fact that it did not cancel the filings with the Railroad Commission of California and the Interstate Commerce Commission, and that it defended claims made against the defendants. In short it treated and intended the issuance and delivery of its insurance policies to defendants as effective and binding upon it, even though it had not secured from defendants the retrospective agreement which it was demanding.

While the defendants’ agent Cantlen testified at one time that he did not regard the transaction as complete until the retrospective agreement was signed, he also testified that he considered his principal covered by these policies, and his conduct shows that he thought that such was the situation.”

IV.

VOLUNTARY AUDITS AND DEPOSIT PREMIUMS HAVE
NOTHING TO DO WITH APPELLEE'S CLAIM.

Appellants assert that appellee's conduct, in accepting lower premium payments voluntarily made by appellants on their monthly reports (which were subject to final audit) together with appellee's lack of action to force collection of the delinquent deposit premiums (which were not in default until after appellee sent cancellation notices to appellant in December of 1946), is evidence that appellants are not now obligated to pay appellee the final audit premium balance plus interest and costs. Appellants say there has been a waiver and estoppel by appellee.

Admittedly, appellants were covered by insurance, so inaction as to delinquent deposit premiums not yet in default is of no consequence. Also, the Court found that the policies in question had been issued to supersede the binder and thus provide insurance from and after September 1, 1946. So the policies alone determine the 2.20 rate which was used in connection with the final audit in computing the amount on which the premium balance rests. Thus, appellee's conduct as to the lesser voluntary premium payments prior to final audit and the delinquent deposit premiums prior to default, is beside the point. Even more remote, as far as appellee is concerned, are contentions made by appellants as to the misconduct of their broker, Mr. Cantlen, or the self-serving statements of their president, Mr. Coughlin. The trial Court dismissed this issue with the terse comment (R. 51):

“The fact that no deposit premium was paid and that plaintiff received premiums based upon the old rates are not, under the circumstances, inconsistent with the fact that these policies were then in effect.”

V.

APPELLANTS' BROKER, AS THEIR AGENT, BOUND APPELLANTS.

Section 33 of the California Insurance Code provides that the term “insurance broker” means one who for compensation and on behalf of another transacts insurance with, but not on behalf of, an insurer. In other words, Mr. Cantlen, the broker in this case, transacted insurance with appellee on behalf of appellants and not on behalf of appellee.

There is no question of ostensible agency where the insurance broker's authority was actual and express. (*K. C. Working C. Co. v. Eureka-Sec. Ins. Co.*, 82 Cal. App. (2d) 120, 129-130.) This was certainly true in this case from 1930 on and particularly as to all insurance policies issued by appellee prior to September 1, 1946. As to the two new policies issued effective on and after September 1, 1946, appellee had no knowledge of any change in Mr. Cantlen's authority, if, in fact, it had been altered. Even so, and without the insured's knowledge, the insurance broker remains the insured's agent by implication, at least, as where one engaged in the insurance business requests the issuance of a policy from an insurance company on the

representation that he is the agent for the applicant and the company has no reason to believe otherwise. (*Universal Ins. Co. v. Manhattan M. Line*, 82 Cal. App. (2d) 425, 431.) Furthermore, a contract is binding on the parties if executed by an agent of one of the parties, even if the principal did not see it or sign it or know anything further about it. (*Earle Restaurant v. O'Meara*, 160 Fed. (2d) 275, 276.)

There is no doubt that, where the insurance broker acts within the scope of his authority, his acts and his knowledge of the facts constitute the acts and knowledge of the principal because the insurance broker is under a duty to keep his principal informed and it is presumed that his principal is so informed and knows all that the insurance broker knows concerning the insurance in question; it is no defense for the principal to contend that the insurance broker did not inform his principal fully as to the facts. Thus in *Shapiro v. Equitable Life Assur. Soc.*, 76 Cal. App. (2d) 75, the Court said at page 87:

"It was the duty of the agent to communicate to his principal all knowledge which he had received respecting the subject matter of the agency and the presumption is that he performed that duty. Notice given to or possessed by an agent within the scope of his employment is notice to the principal. (Civ. Code, Sec. 2332; *Shamlian v. Wells*, 197 Cal. 716, 720 (242 P. 483); *Early v. Owens*, 109 Cal. App. 489, 494 (293 P. 136); *Waldeck v. Hedden*, 89 Cal. App. 485, 491 (265 P. 340).) One who acts through an agent will be presumed to know all that the latter learns concerning the

transaction, whether it is actually communicated to the principal or not. There is no difference in this respect between actual and constructive notice. It is of no avail that the agent failed to communicate to his principal what he had ascertained. (*The Distilled Spirits case (Harrington v. United States)*, 11 Wall. (78 U.S.) 356, 367 (20 L. Ed. 167, 171).)''

The fact that appellants in this case did not see or obtain physical possession of the policies of insurance from Mr. Cantlen, their agent and broker, until October 22, 1947, is of no importance to appellee's claim since the policies were accessible to appellants after the policies were issued and delivered by appellee to their insurance broker in September, 1946.

For example, in a suit over a fire insurance policy, the insured, one Van Meter, didn't know the policy on its face covered logging equipment only while in Washington. The insured had been told otherwise by his agent. The policy when issued was turned over to the finance company which had loaned money on the equipment. The insured never saw the policy. The equipment was moved to California where it was destroyed by fire. The claim was not covered. A reading of the policy would have disclosed the limiting provision. In *Van Meter v. Franklin Fire Ins. Co.*, 164 Fed. (2d) 325, this Court said at page 327:

''The fact that appellant, Van Meter, did not see the policy prior to the loss does not aid him. The policy was held by the finance companies, but this

did not negative his right to inspect it; secondly, these companies held their right to the policy through Van Meter and at his instance. The fact that all failed to notice a provision, which would readily be seen, and take exception thereto does not prevent the operation of the provision."

The insured is also bound where the insurance company intended to deliver the policy to the insured by placing it in the control of the insured's broker who was acting for the insured. (*N. Y. Life Ins. Co. v. Smith*, 91 So. 456, 458.)

In the leading California case of *Solomon v. Federal Ins. Co.*, 176 Cal. 133, it is clearly held that the insured is fully responsible for the broker's acts as his agent. In this connection the Court said at pages 138 and 139:

"It is well settled that where, in circumstances such as are presented here, an insurance agent requests insurance from a company which he does not represent, he is acting for the insured, who is responsible for misrepresentations in the application made out by the broker. (Citing authorities.) The law in this state goes further and holds the insured responsible for misrepresentations in the applications when it is drawn by a regular soliciting agent of the insurance company where, as in the policy here, such an agent has no authority to waive the provision contained therein that the policy is to be avoided if any misrepresentation has been made concerning a material fact."

The insured was bound to pay the premium where the broker acted, even though fraudulently, the Court in *Eagle Star & British Dominions v. Tadlock*, 22 F. Supp. 545, saying at page 548:

“An insurance broker is the agent of the insured and not of the insurer. The insured is bound by the broker’s acts and is charged with his knowledge. He cannot challenge the validity of the contract which the broker makes for him. He may even be bound by his fraudulent acts or representations.”

The *Tadlock* case cites, as one of the authorities for the above quotation, the case of *Strangio v. Consolidated Indemnity & Ins. Co.*, 66 Fed. (2d) 330, where the law of California is stated by this Court as follows on pages 335-336:

“And, being a broker, he was, under the general law, the agent, not of the insurance company, but of the insured.

“In 32 C. J. 1054, the rule is thus stated:

“‘An insurance broker, like other brokers, is primarily the agent of the person who first employs him, and therefore, an insurance broker or agent employed to procure insurance for another, ordinarily is not the agent of the company, and owes no duty to it; but is the agent of the insured as to all matters within the scope of his employment, and acts or knowledge of such broker or agent will be binding on or imputed to insured and not to the company. In the absence of statute such broker or agent is the agent of insured, even though he solicits

the insurance, or the policy is delivered to him, and he collects the premium as agent of the company; and even though he receives his compensation from the company or its agent.'

"Similarly, in 22 Cyc. 1427, it is said: 'An insurance broker is ordinarily the agent of the person seeking insurance.'

"Again, in Cooley's Briefs on Insurance (2d Ed.) vol. 5, pp. 4065, 4066, we find the following language: 'Generally, the question as to whether a person through whose aid a policy is procured is the agent of the insurer or the insured is raised with reference to insurance brokers. By the weight of authority, a broker who merely solicits applications and afterwards places the insurance with such companies as he can induce to take the risk, is regarded as the agent of the insured, and hence the insurer is not charged with knowledge of matters contrary to the provisions of the policy of which the broker has notice, but which he does not communicate to the insurer or its authorized agent.' "

Failure to pay the deposit premium or sign the proposed retrospective agreement is of no importance insofar as the binding effect of the insurance is concerned, because, Mr. Cantlen, the broker, was acting under instructions to keep appellants insured and, in accordance with such instructions, caused appellee to issue insurance. So delivery of the policies to appellants' broker made appellants liable to pay the earned premium—developed by the final audit—from and after the date the risk attached.

Thus, where the insured asked a broker to procure insurance and subsequently the broker did place the insurance where the policy called for a deposit premium which the insured failed to pay, the failure to pay the deposit premium was immaterial because liability on the part of the insured to pay the earned premium to the insurer attached as of the date the risk attached. Failure to sign the proposed retrospective agreement as to the final audit premium would also appear to be immaterial where the conduct of the parties claim-wise showed each believed the insurance was in force as written until cancelled. Consequently, in *Tarleton v. De Veuve*, 113 Fed. (2d) 290, this Court said at pages 296 and 297:

“The decisions in California support this holding. ‘The most conclusive evidence that the policy had been delivered, that credit had been extended Hill, and that the policy was in full force and effect up to March 14, 1934. is the determined effort of the company to collect the earned premium up to that date * * *. This is an admission on its part that the policy had been delivered, for without its delivery no part of the premium could have been earned. It is also an admission that credit had been extended to Hill at least to March 14, 1934. It is also an admission that the policy was in full force and effect up to that date.

‘It seems too clear for argument that Hill believed he was insured and that the company believed that it was his insurance carrier up to at least March 14, 1934. It seems to us that

the parties to the insurance contract by their conduct have placed a practical interpretation on the questions of delivery and extension of credit that must be construed as binding on the commission and on this Court. (Cases cited.)' "

Again in *Detroit T. Co. v. Transcontinental Ins. Co.*, 105 Cal. App. 395, the Court said at pages 399 and 400:

"*The controversy between the plaintiff and its agent respecting the rate of insurance had nothing to do with the validity of the policy.* The payment of the premium and the retaining of the policy by Marsh & McLennan after their fruitless effort to adjust the rate with the defendant is a circumstance strongly tending to show their agency for the plaintiff. Regardless of their relationship toward other insurance companies, there is ample evidence to support the finding that in this particular transaction Marsh & McLennan acted as the agents of the plaintiff. Mr. Hill, who was manager of the milling company, testified: 'Marsh & McLennan had full charge of all of the insurance for the Hutchinson Lumber Company * * * Under more general instructions as to the extent of the lines to be carried, they were charged with all of the details of seeing that we were kept covered and seeing that we maintained conditions at the plant that we were required to maintain under the policies and seeing that our rates were kept low and in general serving us in the capacity of insurance agents—brokers—and managers to whom we intrusted all of our insurance affairs.' " (Emphasis ours.)

The facts in the case at bar clearly show that for many years appellants' broker, Mr. Cantlen, had been charged with the duty of keeping them insured with appellee, that he had handled all discussions with appellee, that at his request appellee had renewed the insurance each year and had filed insurance coverage for appellants with the Railroad Commission and I. C. C., that all documents relating thereto, such as binders, policies, bills, notices, audit statements, reports and correspondence, had passed between appellee and appellants' broker for appellants' benefit, that the parties knew of the unfavorable loss experience of appellants over the years and the need for an increase in rate, that appellants had all the benefits of the insurance from September 1, 1946, to date of cancellation, including filings with the Railroad Commission and I. C. C., certificate of insurance on business deals and also full claim protection, all at substantial cost and expense to appellee, that the parties treated the insurance as effective until cancelled, and that the rate during the period of insurance as shown by the policies was \$2.20 per \$100.00 of appellants' gross earnings. Therefore, appellee contends appellants' broker, as their agent, bound appellants to appellee to pay the balance of \$7,841.99 due appellee on the earned premium developed in the final audit at the rate stated in the policies. Speaking of Mr. Cantlen's binding acts, the Court said in its opinion (R. 51):

“He received a claim against the defendants shortly after the delivery of these policies to him.

and sent it to the plaintiff for defense with a covering memorandum referring to these policies by their numbers. A short time later, in November, 1946, he advised the American Manganese Company, a customer of the plaintiff, by letter to the effect that defendants were covered by insurance up to September 1, 1947, which was the expiration date of these policies. He sent a copy of this letter to the defendants. He sent to plaintiff voluntary audits with specific reference to these policies. It will serve no purpose to review every item of evidence indicating that both plaintiff and defendants' agent Cantlen considered that these policies were in effect and superseded the binder. It will suffice to say that they compel the conclusion that these policies became effective even though the retrospective agreement was not executed. Accordingly I so find, and therefore find that the plaintiff is entitled to recover from defendants the amount of its claim, \$7841.99, together with legal interest thereon from October 22nd, 1947."

VI.

APPELLANTS ARE BOUND TO APPELLEE BY ACCEPTING THE INSURANCE BENEFITS.

Where an insured accepts and retains the benefits of policies calling for a greater premium than that which the insured believed he had contracted to pay through his agent, the insured, by acts consistent with insurance coverage, ratifies his agent's acts and becomes bound to the insurance company to pay the

greater premium even though the agent may have acted without full authority in procuring issuance of the insurance and accepting the policies thereafter. Thus, by submitting loss claims during the life of the policy, the insured ratifies the procuring of the insurance by the agent and is bound to pay the premium called for by the policies to the insurance company (2 Couch on Insurance, 1364-1366). Our California Supreme Court has recently again recognized the age old rule that "it is axiomatic that the defendant may not accept the benefits and avoid the obligations imposed by the understanding and agreements to which it was a party. To permit that result would be to condone a fraud upon the plaintiff" (*Simmons v. California Institute of Technology*, 194 Pac. (2d) 521, 527).

Where, upon application, the insurance company issues a policy binding itself to reimburse the insured for any loss as covered by the policy, the insurance company is entitled to collect premiums stated in the policy for the risk assumed by insurance issued. Thus in the recent case of *Tri-State Casualty Ins. Co. v. Stekoll* (1949) 208 Pac. (2d) 545, the Supreme Court of Oklahoma said at page 550:

"The plaintiff applied for and secured the contract covering his Kansas operations for his own benefit, in order to be reimbursed and thus suffer no loss for any injuries his employees in Kansas might receive. Defendant contracted to indemnify plaintiff against such losses, in consideration of a premium, which the parties agreed

should be calculated upon the combined payrolls of plaintiff's operations in both states. Having unequivocally bound itself to reimburse plaintiff for any loss arising under the terms of the endorsement, it is *clear that defendant did contract to accept such risk, was bound by its contract in this respect, and therefore was entitled to charge and collect premiums for the risk so assumed.*" (Emphasis ours.)

The company is entitled to collect the earned premium where the risk attaches thus making the insured liable for the payment thereof (14 Cal. Juris. 474). It is clear that appellee was bound on its insurance covering appellants and further that appellants treated the contract in that manner by accepting all the insurance benefits the policies could give. It would be a fraud on appellee to permit appellants to avoid the full premium obligations the policies called for. Thus appellants are bound to appellee by accepting the insurance benefits. The trial Court pointed this up when it stated (R. 53):

"Coughlin, the defendants' chief executive, was very experienced in this line of business, and he knew that these defendants could not operate unless they had insurance, and therefore must have inquired and known that these policies had been issued. As heretofore stated, a copy of Cantlen's letter to the American Manganese Company was sent by him to defendants in November, 1946, which clearly showed that the policies were in force. Defendants required plaintiff to defend claims made against them for accidents occurring up to the effective cancella-

tion date, even though some of these claims were not filed until after the defendants had in April, 1947 rejected plaintiff's claim for premiums figured upon the rates fixed by the policies."

VII.

APPELLANTS RATIFIED THE BROKER'S ACTS.

Assuming, but not conceding, that the insurance that was issued and in effect from September 1, 1946, to January 21, 1947, could because of lack of knowledge be paid for at the rate of 1.223 per \$100.00 of gross earnings as set forth in the expired policy, certainly after cancellation and when appellants obtained full knowledge of all the facts and became completely aware of appellee's insistence that appellee be paid a premium at the rate of \$2.20 per \$100.00 of gross earnings as set forth in the new policies, then, having possession of that full knowledge and having, with that knowledge, refused appellee's demand to pay the additional earned premium on October 22, 1947, nevertheless, on December 4, 1947, appellants referred a lawsuit to appellee to defend under the very policies the rate of which appellants disputed and appellee accepted the defense. By so doing appellants ratified the acts of their agent and broker in negotiating for, accepting delivery of and retaining the policies in question, thereby obligating appellants to pay the balance due on the earned premium to appellee at the rate of \$2.20 per \$100.00 of gross earnings. Where the insured con-

tends that the policy was not authorized and yet subsequently the insured acts so as to recognize the validity of the agreement, with full knowledge of the facts, the insured thereby ratifies the acts of its own insurance agent and broker and the policy is binding upon the insured as to all of its terms (Insurance; 44 Corpus Juris Secundum 860). Thus, in *Doerr v. Fandango Lumber Co.*, 31 Cal. App. 318, the Court said at pages 325 and 326:

“Indeed, the proposition that ratification of a contract, the making of which is unauthorized by one of the principals, may be effectuated by a recognition, howsoever informally, of the agreement and the obligations arising by virtue thereof, is elementary. A familiar and common application of this doctrine is to be found in those cases where an agent, in making a contract for his principal, transcends the scope of his authority as such, and the principal, after the contract has been made, although not at that time legally bound by its terms, does some act recognizing the validity of the agreement—as, for instance, *accepting some of the benefits or assuming some of the burdens thereof*. In such case, quite obviously, *the principal will be deemed from his acquiescence in the contract to have ratified the unauthorized act of his agent, and will be held to its terms and conditions*, notwithstanding that he has not in express language or in a formal manner ratified the contract.” (Emphasis ours.)

Since appellee undertook to defend appellants and assumed control of the claim made upon appellants, appellants were benefited by appellee being bound to

pay the full amount of any judgment awarded against appellants, not exceeding its policy limits (*Rogers v. Pacific Coast Casualty Co.*, 33 Cal. App. 70, 73; *Tulare Co. Power Co. v. Pacific S. Co.*, 43 Cal. App. 315; *J. Frank & Co. v. New Amsterdam C. Co.*, 175 Cal. 293). In this case appellee's policy limits were well in excess of the claim being made upon appellants in the lawsuit which appellants referred to appellee on December 4, 1947, to defend after refusing on October 22, 1947, to pay the balance due on the earned premiums demanded of appellants by appellee. By presenting claims, which appellee acted on, appellants were thereafter in no position to repudiate the provisions of the policy calling for the payment of the earned premium (*Smith v. Smith*, 80 Cal. 323).

Where the terms of a contract are in dispute and subsequently, with full knowledge of the facts, the party disputing the same acts in accordance with the terms of the contract, a ratification occurs (*Pacific Vinegar, etc., Works v. Smith*, 145 Cal. 352, 356; *California Nat. Supply Co. v. O'Brien*, 51 Cal. App. 606, 622). Thus, where a broker negotiates a contract of insurance which the insured subsequently claims to have been unauthorized, but which definitely benefits the insured, and then after acquiring full knowledge of all the facts, the insured makes further claim upon the insurance company for the benefits of the policy, the insured ratifies the act of the broker and is bound by the provisions of the policy (*Brown v. Crown Gold Mining Company*, 150 Cal. 376—see note 7 A.L.R. 1447).

Where the insured notifies the insurer of accidents, that is some evidence that the insured believes that the insurer is on the risk. This is particularly true where the insurer has caused filings to be made with the Railroad Commission and the I. C. C., as these filings constitute definite evidence that the insurer believes that it is on the risk until the policy is terminated, or cancelled on a proper notice, and, under such conditions, the insured is liable for the premiums on the policy (*Ohran v. National Automobile Ins. Co.*, 82 Cal. App. (2d) 636, 642, 646). The rule has long been recognized that a person cannot retain the benefits of a contract and insist that he is only bound by the obligations thereof to the extent that he desires to recognize them, particularly where his agent contracted in his behalf. By knowingly claiming the fruits he ratifies the contract and assumes the burdens, the ratification being in the nature of an estoppel (*Patterson v. Crowell*, 15 Cal. App. 105, 108; *Newhall v. Joseph Levy Bag Co.*, 19 Cal. App. 9, 26). In *Gardner v. City of Glendale*, 45 Cal. App. 641, the Court said at page 644:

“If a principal ratifies any portion of an unauthorized transaction of his agent, he must be deemed to have ratified the whole of it. A principal may not receive the benefits and at the same time disclaim responsibility for the methods adopted by his agent. The acceptance of the benefits of the transaction by the principal constitutes the ratification of the acts of his agent. The Supreme Court aptly stated the rule in *Gribble v. Columbus Brewing Co.*, 100 Cal. 67, 71 (34

Pac. 527), as follows: 'And where, with full knowledge of all the facts involved, a principal reaps the fruits of the unauthorized contract of his agent, and for some time yields acquiescence to its provisions, he will be deemed to have ratified it, and will be estopped, as against one who has fully performed the contract on his part, from repudiating it to the injury of the latter.' '' (Emphasis ours.)

VIII.

APPELLEE ENTITLED TO INTEREST.

On October 22, 1947, the day appellants' broker transmitted appellee's demand to appellants, appellants unequivocally advised appellee "it is therefore necessary for us to decline payment of your Invoices" demanding payment of \$7,841.99 (Plaintiff's Exhibit 18; R. 257). Appellee has prayed for and been granted interest at 7% per annum from that date. The authorities support that ruling and indicate that even an earlier date, "the due date" may be applicable. In this case the due date was from and after the receipt of the "bills" weeks earlier than October 22, 1947 (Plaintiff's Exhibit 13; R. 158).

In the leading case of *Gray v. Bekins*, 186 Cal. 389, the Court said at page 399:

"The general rule is that interest is allowable from the time the sum in suit becomes due if the same is certain or can be made certain by mere calculation. In actions upon contracts the

sum due or the means of calculating the sum are usually clearly provided for in the contract and interest is consequently allowable from the time the sum in suit becomes due.”

In *Pitzer v. Wedel*, 73 Cal. App. (2d) 86, plaintiff was claiming 7% interest which the Court allowed from the date of demand for payment, the Court saying at pages 92 and 93:

“Where there is no contract to pay interest, in the absence of statutory provision to the contrary, the law awards interest upon money from the time it becomes due and payable, if such time is certain or can be made certain by calculation. The refusal of the trial Court to allow interest from the date of the original agreement must be affirmed.”

To the same effect are:

Perry v. Magneson, 207 Cal. 617, 622;

Yule v. Miller, 80 Cal. App. 609, 617.

The payment of interest, as prayed for, is in the nature of damages for the retention of the liquidated balance rightfully due appellee on the earned premium as determined by final audit (California Civil Code, 3287, 3302; *Hood v. Smith*, 39 Southeastern (2d) 604; Restatement of Law of Contracts, Sec. 337(a)). Despite the earlier “due date,” appellee is satisfied with interest as granted from October 22, 1947.

CONCLUSION.

In this suit on contract based on two insurance policies, appellee is entitled to judgment for a final audit premium balance of \$7,841.99, due appellee on such policies, together with interest at the rate of 7% per annum from at least October 22, 1947, the date when appellants definitely declined appellee's demand for the payment of the same. Accordingly, the judgment below, being supported by substantial evidence, must be affirmed.

Dated, San Francisco, California,
February 28, 1951.

Respectfully submitted,

HADSELL, MURMAN & BISHOP,

SYDNEY P. MURMAN,

*Attorneys for Appellee The Fidelity and
Casualty Company of New York.*

No. 12,722

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK (a corporation), and
BAYLY, MARTIN & FAY, INC. OF
CALIFORNIA (a corporation),

Appellees.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

**BRIEF FOR APPELLEE
BAYLY, MARTIN & FAY, INC. OF CALIFORNIA.**

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FILED

MAY 1 1951

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CLERK

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Northern District of California, Southern Division.

BRIEF FOR APPELLEE

BAYLY, MARTIN & FAY, INC. OF CALIFORNIA.

STATEMENT OF THE CASE.

Plaintiff and appellee, The Fidelity & Casualty Company of New York (hereinafter called plaintiff) sued California Motor Transport Company and its associates, defendants and appellants (hereinafter called defendants) for premiums alleged to be due by

reason of the issuance by plaintiffs to defendants of certain public liability insurance policies.

Defendants, by proper order, brought Bayly, Martin & Fay, Inc. of California, third party defendant and appellee (hereinafter called third party defendant) into this proceeding alleging that Bayly, Martin & Fay had acted as the insurance broker in the matter, to wit, had acted as the agent for defendants in procuring the insurance for the latter and as agent of plaintiff for the purpose of collecting the premiums. The third party complaint is based on the theory that third party defendant received and accepted the insurance policies in question but failed or refused to advise its principal, the defendants, of the receipt thereof.

Upon conflicting evidence the trial Court found that the receipt of said policies of insurance and the contents thereof was duly and timely reported to defendants by third party defendant.

The area of conflict between the testimony and evidence of all of the parties was relatively narrow. Both plaintiff and defendants depended heavily upon testimony and evidence of third party defendant. Once the trial Court made the key finding that third party defendant had revealed to defendants the receipt of the policies, and had so revealed the effect in dollars of such policies, the case against the third party defendant collapsed.

An analysis of the four alleged causes of action against the third party defendant, a showing that

each collapses in face of the key finding made by the trial Court, and references to the transcript to show that an actual conflict in the evidence exists, constitute the basic showing of third party defendant in this brief. No attempt will, of course, be made here as was done in the trial Court, to show the inherent improbability of the testimony of defendants concerning the key conflict, but certain of the statements of defendants in their opening brief will be referred to for clarity.

ARGUMENT.

THE FACTS IN THE LIGHT OF THE SPECIFICATIONS OF ERROR.

Specifications 12 to 18, inclusive, are directed at alleged errors of the trial Court relating to the complaint of the defendants against the third party defendant. Each of these specifications complains either of the insufficiency of the evidence to support a finding or upon the failure of the Court to find certain things. Specifications of error of this type would appear to require a more detailed statement of facts than should be necessary in a brief before this Honorable Court. Such statement follows:

Bayly, Martin & Fay, third party defendant, had handled the public liability insurance problems of the defendants since 1941 under policies issued by plaintiff. At all times herein mentioned third party defendant acted through its vice president, Mr. Cantlen. Each year the policies would expire on September 1st,

and each year, prior to September 1st, Cantlen would negotiate with the company for the rate to be charged the succeeding year. Upon each renewal the terms of the insurance policy were identical with the previous year with the exception of the premium rate (Tr. pp. 300-318).

Prior to September 1, 1946, plaintiff demanded a higher premium rate from the defendants and also demanded a retrospective agreement under the terms of which the rate would be determined by the loss experience, but in no event would the rate be less than 1 per cent of the gross receipts or more than 3 per cent of the gross receipts with the current premium payable at 2 per cent of the gross receipts. It is this 2 per cent that brings about the \$2.00 per \$100 rate to which all of the parties herein refer (Tr. p. 321).

Plaintiff issued a binder under date of August 27, 1946 to cover the defendants during the negotiations for the new rate (Defendants' Exhibit B). Cantlen took this binder to the defendants on August 27th having with him various data necessary for the discussion with the defendants. At that time Cantlen explained the retrospective plan to Mr. Coughlin, acting for the defendants. At that meeting Cantlen drew up third party defendant's Exhibit NN, which cogently and forcefully proves that the \$2.00 rate was discussed. Coughlin swore he had "never heard of the rate", but does not deny that Cantlen drew up Exhibit NN in his presence, and in fact admitted it (Tr. pp. 353-354).

Coughlin did not read the binder but turned it over to his employee Davis; Davis made no report on it to Coughlin; the binder on its face is for 60 days only, and on the reverse side of the binder it states "No risk shall be bound otherwise than on the company's official form", and that no risk shall be "bound by letter nor renewed by letter" (Defendants' Exhibit B); at the end of the 60 days, Coughlin did not ask for an extension of the binder. The 60 day period of the binder ended October 26th; on or about November 18th, after the 60 day period was ended, Davis, acting for defendants, received a copy of a letter from Cantlen to the American Manganese Steel Division in which it was plainly stated that defendants had insurance in effect until September, 1947; in fact, under date of November 5, 1947, Davis had written Cantlen asking that he, Cantlen, write the letter to American Manganese advising them of the expiration date, and asked Cantlen to send him a copy of same (Third Party Defendant's Exhibit PP); even before November 18, 1946, and during the 60-day period in question Coughlin received the proposed retrospective agreement (Defendants' Exhibit C), from Cantlen; Exhibit C contains a reference to the new policy SPL 20968 but Coughlin did not look at it, didn't read it and didn't ask anyone in his organization to read it; Coughlin knew a binder gives coverage only until a policy is issued (Tr. p. 347).

Pursuant to instructions from Coughlin, Cantlen went back to the plaintiff and sought an arrangement other than the \$2.00 rate and the retrospective agree-

ment. Cantlen also scurried around looking for a market other than the plaintiff wherein he could place defendants' risk at a more advantageous rate (Tr. pp. 325-326).

On or about September 23, Cantlen was called to the Fidelity and Casualty Company office and delivered an ultimatum that the policies would have to issue on a retrospective plan basis (Tr. p. 326); shortly thereafter Cantlen received the policies SPL 20968 and SPL 20950, Plaintiff's Exhibits 3 and 4, and the proposed retrospective agreement, Defendants' Exhibit C; upon receipt of the policies Cantlen read them and knew that the rate was therein set up as a standard rate of \$2.00 per \$100 of gross earnings.

Immediately after receiving the policies and the retrospective agreement from the plaintiff Cantlen went to see Coughlin taking with him the proposed retrospective agreement but not taking the policies because Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed; the policies were finally physically delivered to the defendants on or about October 27, 1947, at which time Cantlen was still arguing with the plaintiff that they should not charge the \$2.00 standard rate (Plaintiff's Exhibit 18).

At this meeting immediately after receiving the policies and the retrospective agreement, Cantlen told Coughlin of the declaration (issuance) of the policies; he explained in detail how the retrospective agreement worked and what it would cost Coughlin, using de-

fendants' past gross revenues as a projection into the future; the retrospective agreement contained a reference to Policy SPL 20968 on its first page (Defendants' Exhibit C); at all times thereafter in correspondence with the plaintiff, the new Policy SPL 20968 was used by third party defendant. Coughlin himself testified substantially the same concerning this meeting (except as to being told about the issuance of the policies); he testified that Cantlen brought the retrospective agreement to his, Coughlin's, office but that he did not understand it; that Cantlen left the agreement on Coughlin's desk; that Coughlin did not observe the reference to Policy SPL 20968 that showed on the front page of the retrospective agreement. In addition to a previous statement in the record as to Cantlen's testimony concerning the fact that he told Coughlin of the issuance of the policies, Cantlen's testimony on page 272 of the transcript reads as follows:

Q. Are you sure that you even told Mr. Coughlin that any policies had been received by you from Fidelity?

A. Yes, I am quite sure.

Q. When did you tell him that?

A. At the time of delivering the retrospective agreement.

Q. Do you have any definite recollection of having told Mr. Coughlin at that time that policies had been received by you from Fidelity at the same time as they delivered to you the retrospective agreement?

A. I feel certain I did.

Q. Do you have any definite recollection of it?

Mr. Murman. It has been asked and answered.
Mr. Eisner.

Mr. Eisner. He says, "I feel certain of it." I think that is a conclusion.

Q. Do you have any recollection of having made any such statement?

A. Yes, I think I did, Mr. Eisner.

Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of \$2.20, as compared with the rate of 1.223, which he had been paying?

A. No, he did not.

Coughlin's denial that Cantlen told him of the issuance of the policies reads as follows (Tr. p. 407):

Q. Did you ever agree to pay a rate of \$2.20 per annum?

A. I should say not.

Q. Did you know that any policies had ever been written with a rate of \$2.20 per annum prior to October 22nd, 1947?

A. No, sir, never heard of the rate.

In December, 1946, plaintiff demanded the signing of the retrospective agreement and upon not receiving the same canceled the insurance effective January 19, 1947. The final audit of the premiums as provided in the policy and in all previous policies was not made up until April of 1947. Upon receipt of this audit Cantlen learned that the plaintiff was demanding the \$2.00 basic standard rate. From April until August, Cantlen argued with plaintiff seeking to have it reduce the rate. In August of 1947, Cantlen drafted a letter for defendants' signature (Plaintiff's Exhibit 18) but was unable to see Coughlin until October of 1947.

Coughlin signed the letter that was drafted by Cantlen.

Before passing on to a detailed consideration of the findings on these issues there is one further point which bears comment. Appellants in their argument place considerable stress on the fact that this appellee continued its negotiations with plaintiff concerning the premium rate and the proposed retrospective agreement during the entire time that the coverage in controversy was in effect. From this fact appellant contends for the conclusion that such coverage was in its entirety an extension of the former policy at the former rate. This fact rather points to this appellee, as broker and agent for appellants, at all times carrying out its responsibilities and acting for the best interests of its principal. Mr. Cantlen tried in every possible manner to get a better deal for his client. The fact that the policies had been issued did not stop him from trying to place the risk elsewhere and from trying to have plaintiff revise or reduce the premium rate in question. If he had been successful in placing the risk in another company on more favorable terms the policies issued by plaintiff could have been canceled. If he had been successful in having plaintiff change the premium rate the new policies could have been re-written. It is submitted that the appellants' contention on this phase of the case points up the consistent picture of this appellee working untiringly and in utmost good faith to serve the interests of appellants. Whether the policies in question, that had been issued in fact, were or were

not "issued" as a matter of law is to be decided between plaintiff and defendants, and does not affect third party defendant.

**ANALYSIS OF THE FOUR CAUSES OF ACTION ALLEGED BY
DEFENDANTS AGAINST THIRD PARTY DEFENDANT.**

The only material conflict between the witnesses for defendants and those for the third party defendant, and the only possible issues between said parties, are the questions (1) whether or not Cantlen advised Coughlin that the binder covered the defendants pending *all* negotiations for new insurance, and (2) whether or not Cantlen advised Coughlin of the issuance by plaintiff of the two insurance policies at or about the time of issue.

First cause of action.

The first cause of action is based on the theory that third party defendant represented to defendants that the binder would cover defendants pending the negotiations for the renewal of the insurance, at the old premium rate at 1.223 per cent of the gross receipts; that said representations were made to induce defendants to continue to pay said rate (*sic*); that such representations were false and untrue and were so known to be by third party defendant.

Cantlen testified that at the time he delivered the binder to Coughlin he explained the retrospective plan and told Coughlin the binder would be his, Coughlin's, coverage pending renewal. A letter of transmittal from Cantlen to Coughlin on the binder states the

same thing (Defendant's Exhibit I). Coughlin testified that Cantlen, when he delivered the binder, told him it was to be in effect at the old rate during the negotiation. It is significant in this connection that the binder on its face had a blank for the insertion of estimated premium but that this had not been filled in by plaintiff.

The various findings of the Court have resolved this conflict between the testimony of Cantlen and the testimony of Coughlin in favor of Cantlen. The binder carried on its face a statement that it, the binder, would be superseded by the issuance of policies. On or about October 1st, the policies were issued and given to Cantlen. Cantlen immediately carried out his duty and notified Coughlin of the issuance of the policies.

Whatever the legal effect as between plaintiff and defendants of the issuance of the policies, it is clear that there is ample evidence for the findings of the Court absolving the third party defendant of any liability under the first cause of action.

Second cause of action.

The second cause of action is the same as the first except in place of alleging the representations were false, it alleges the third party defendant had no reasonable grounds for believing such representations to be true because the third party defendant had received the two policies in question.

As we have stated, there was a conflict as to what was said and done when the binder was delivered,

concerning the coverage of the binder. This conflict was resolved in favor of third party defendant by the trial Court. Further, there was a sharp clash of testimony as to whether or not Cantlen told Coughlin of the issuance of the policies. This also was resolved in favor of third party defendant by the trial Court.

The second cause of action falls with the findings above noted, both of which were made on conflicting evidence.

Third and fourth causes of action.

The third cause of action is based on the theory that third party defendant "concealed from and failed to notify defendants" of the issuance of and receipt by third party defendant of the two policies SPL 20968 and SPL 20950.

The fourth cause of action is based on an allegation that third party defendant "carelessly and negligently failed and omitted to notify" defendants of the issuance and receipt of said policies.

The issue is really very narrow. That issue has been decided against the defendants and appellants by the trial Court on conflicting evidence.

THE CONTENTIONS IN APPELLANTS' OPENING BRIEF.

With the foregoing highlights on the limited issues between defendants and third party defendant in mind, we are logically led into a consideration of the specific arguments set forth in defendants' opening brief concerning them. In their brief defendants

start their discussion of these issues on page 53, referring generally to the "wrongful and unauthorized action by Bayly, Martin & Fay." It should be noted in passing that we do not agree with appellants' statement that third party defendant's lack of authority to accept the insurance policies is an admitted or uncontradicted fact. To the contrary, the answer of this third party defendant alleges that defendants were advised that the policies would be issued, that the premium rate would be based upon \$2.20 per \$100.00 of gross receipts, and that defendants should sign the proposed retrospective agreement. The answer further alleges that third party defendant received the policies on or about October 1, 1946, and that the receipt thereof and the contents thereof were duly reported to defendants. The trial Court on conflicting evidence found all of these allegations to be true, so that it may hardly be contended that lack of third party defendant's authority to accept the policies is uncontradicted or admitted. The record in its entirety presents a consistent picture in which this third party defendant, as broker, accepted and carried out not only the authority but the responsibility of keeping defendants adequately and fully covered with liability insurance not only to protect defendants from loss but to effect compliance with the applicable state and federal statutes governing motor transport carriers.

We necessarily return again to the matter of the issuance of the binder which was delivered to, and accepted by, Mr. Coughlin on behalf of the defend-

ants. The binder speaks for itself (Defendants' Exhibit B). Mr. Coughlin knew that plaintiff would not renew the coverage under the expired premium rate, and he knew, or should have known, that the binder on its face left open the amount of the premium. In this connection it may be well to quote the language in 29 *Am. Jur.* 159 on binders as follows:

“Binding slips may be, and ordinarily are, informal instruments. It is not essential that they express all the elements of the contract, such as the rate of premium, or even, it has been held, the name of the insurer. The essential elements of the contract may be implied. *It is sufficient as to the rate, for example, that the binder shows by necessary implication an agreement to pay whatever rate may be fixed.*” (Emphasis added).

See:

Law v. Northern Assurance Co., 165 Cal. 394,
132 Pac. 590.

Coughlin also knew that the binder was only effective for a period of 60 days and he was never advised that the binder was extended, nor did he ask to have it extended (Tr. p. 348) so that when the binder period expired and he still had coverage it is obvious that he knew the policies had been issued and were in effect. The clear factual picture leaves no room for a contention that third party defendant was guilty of any breach of duty in this regard. Again in this portion of their opening brief defendants rely heavily on the fact that third party defendant was continuing its negotiations with plaintiff concerning

a premium rate adjustment. As we have previously pointed out herein, such conduct on the part of third party defendant was entirely consistent with the fact that the policies had been issued.

**UNDER THE CIRCUMSTANCES THE RETENTION OF THE
POLICIES BY THIS APPELLEE WAS NOT A BREACH
OF DUTY.**

Mr. Cantlen testified that he advised Mr. Coughlin that the policies in question had been issued (Tr. p. 272). It goes without saying that if there had been any desire to conceal the fact Mr. Cantlen would not have sent Mr. Coughlin a copy of the letter to American Manganese (Third Party Defendant's Exhibit PP) which stated unqualifiedly that the coverage was in effect for the full policy year. The very plausible reason that the policies were held by third party defendant was, as stated by Mr. Cantlen:

“A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion the transaction wasn't completed.” (Tr. p. 273.)

While it had been the practice of third party defendant in prior years to deliver the policy or policies to defendants when issued, there was in this particular instance an entirely different situation presented, first, by reason of plaintiff's request for the signing of the retrospective agreement, and secondly, by this third party defendant continuing endeavors to negotiate a more favorable contract for its principal,

which efforts were on the direct instructions of defendants (Tr. p. 325).

Defendants contend that the retention of the policies by third party defendant and the failure to deliver same to defendants was the direct cause of the liability for the premiums being imposed on defendants. Without again detailing the documentary evidence and the testimony in the record as to the knowledge of defendants that there was insurance in force, suffice it to say once more that this contention of defendants could only be sustained on the completely implausible theory that Mr. Coughlin, with long experience in insurance matters as they relate to the trucking business, and with complete awareness of the peril faced by his operations in the absence of necessary coverage as required by law, could blissfully choose to ignore all of the facts and circumstances to the contrary and rely on a parol or implied extension of a binder, which stated on its face that it would expire 60 days from its date and could not be extended except by a new binder (Defendants' Exhibit B).

BAYLY, MARTIN & FAY NOT GUILTY OF CONCEALMENT.

With regard to the defendants' contention that third party defendant was guilty of concealment it would appear advisable to refer to the various conflicts in the evidence considered by the trial Court with respect to the testimony of Mr. Cantlen for third party defendant and Mr. Coughlin for defendants. It is alleged in the answer of third party

defendant that the proposed retrospective agreement was delivered to defendants, that the binder (which on its face left open the amount of premium charge) was delivered to defendants, that defendants knew that it was necessary for third party defendant to negotiate for a new premium rate and that plaintiff was demanding a higher rate, that third party defendant reported to defendants on the receipt of the policies and as to the contents thereof, and that defendants knew how, and in what manner, the proposed retrospective agreement would affect the new \$2.20 rate. The trial Court found all of these allegations to be true and the question is necessarily presented as to whether there is evidence to support such findings. In this connection, of course, findings of fact should not be set aside on appeal unless clearly erroneous or plainly wrong, and due regard must be given to the opportunity of the trial Court to judge of the credibility of the witnesses (Rule 52, *Rules of Civil Procedure, Blackner v. McDermott*, 176 Fed. (2d) 498).

It is interesting to note in passing, on this question of credibility of witnesses, that defendants in their opening brief rely heavily on Cantlen's testimony as supporting their contentions against plaintiff, but Cantlen's testimony is suddenly dismissed with a wave of the hand when defendants treat with the narrow issues between them and third party defendant.

Mr. Coughlin admitted that he was shown the retrospective agreement and that Mr. Cantlen ex-

plained it to him in detail and left the agreement with him, and that the binder in question was delivered to and left with him. With regard to the binder Mr. Coughlin testified (Tr. p. 403) that Mr. Cantlen told him that plaintiff would go along at the old rate pending further negotiations. To the contrary, Mr. Cantlen testified that when he delivered the binder to Mr. Coughlin, he stated that premium rate negotiations were still in progress and that the binder was issued pending renewal. (Tr. pp. 239-240.) This testimony is entirely consistent with Cantlen's letter of transmittal (Defendants' Exhibit I) and the trial Court resolved this conflict against defendants. As to the fact of the issuance of the policies in question, Mr. Coughlin testified (Tr. p. 405) that Mr. Cantlen did not tell him the policies had been received, but Mr. Cantlen testified that at the time he delivered and explained the provisions of the retrospective agreement to Mr. Coughlin he told him that the policies had been issued (Tr. p. 272). The trial Court again resolved this conflict against defendants. The fact that Mr. Cantlen shortly thereafter sent defendants a copy of his letter to American Manganese previously referred to (Third Party Defendant's Exhibit PP), stating unequivocally that the essential policy was in effect for the full policy year, necessarily lends further support to the trial Court's finding.

Defendants make a further point of the fact that third party defendant did not immediately notify defendants of a premium demand which third party defendant received on April 19, 1947. What defendants

overlook is that this was the first notice to third party defendant that plaintiff was definitely claiming payment at the \$2.20 rate (Tr. p. 275). Following receipt of this demand Mr. Cantlen for third party defendant engaged in discussions with plaintiff as to the validity of this claim, disputed the right of plaintiff to collect the same (Tr. pp. 276-277), and finally assisted in the drafting of a letter to plaintiff over the signature of defendants, which letter is plaintiff's exhibit 18, declining payment of the invoices (Tr. pp. 278-279). How or in what manner this conduct on the part of third party defendant could in any manner injure appellants is not explained by them in their brief.

A further contention under the general charge of concealment is that this appellee collected premium payments from appellants and failed to promptly remit same to the plaintiff. In the absence of any contention that these payments were not properly credited it appears obvious that even assuming for purposes of argument that there was a delay in transmission, no prejudice resulted to defendants. In fact, however, the evidence shows that the alleged delay in transmitting the payments on to plaintiff is standard practice (Tr. 286).

Appellants then contend that this appellee informed appellants that the binder would constitute its coverage "pending renewal". Such is the usual and general purpose of a binder and was the situation here, so the information given was correct. As to the time limit of the binder, it spoke for itself, and the policies superseded the binder.

In their contentions on this matter of concealment, appellants are apparently attempting to advance some theory, on which they do not expound, that they would have acted differently on disclosure and so would not have been liable for the premiums. On the above considerations we submit that there was full disclosure, and that the trial Court properly so found, but even assuming that some particular fact had not been disclosed, appellants still suffered no damage thereby. The record does not disclose that defendants could have placed the risk elsewhere at the expired premium rate (Tr. pp. 356-365) and further, as to most of the alleged concealments, they could not have taken place until after the policies were finally cancelled and so are necessarily beyond the issues of this case in any event.

The last point raised by defendants in this portion of their brief concerns the fact that third party defendant received monthly reports and remittances of premiums from appellants on the basis of the old premium rate without protest or objection. Wherein could such action constitute a breach of duty on the part of third party defendant? The record shows that all of these reports and remittances were transmitted by third party defendant to plaintiff before third party defendant first became aware that plaintiff was claiming payment of the higher rate, and rate negotiations still were in progress during all of this time.

THE OPINION OF THE TRIAL COURT.

The final portion of defendants' opening brief deals with the portion of the Memorandum Opinion bearing upon the liability of third party defendant.

Defendants first make the point that, contrary to the expression of the trial Court, Coughlin was entitled to believe that the binder would cover the risk for some undetermined length of time and could rely on his agent to get extensions. Defendants here overlook the fact that the trial Court found on conflicting evidence that Coughlin knew the policies had been issued. Not only Cantlen's testimony but the correspondence constituting third party defendant's exhibit PP sustain this finding. The large bold type on the binder itself, delivered to and left with Coughlin, which states that the binder is effective for 60 days, cannot be ignored. At the time the binder was issued it was issued to cover the risk pending renewal, in accordance with good insurance practices, and there was no misrepresentation by the agent on this subject.

The observations above also dispense with defendants' contention concerning the trial Court's statement that the defendants knew, or should have known, of the delivery of the policies to third party defendant. Under the findings, Coughlin knew the policies had been issued. Cantlen told him not only orally but in writing. Coughlin knew the binder was for 60 days only, he never inquired, nor was he advised, that the binder was extended, and he knew he was still covered by insurance after the 60 days expired. He also received a copy of a letter from Cantlen stating that the

coverage was for the full policy year. What more could be necessary to support the opinion of the trial Court?

As to the copy of the letter in question (Third Party Defendant's Exhibit PP) defendants excuse themselves on the contention that copies of such letters when received were simply filed as a matter of course. In this connection it is interesting to note the exact contents of the three letters comprising this exhibit. The letter of the American Manganese Steel Division requests of defendants *specific information concerning the expiration date of the current coverage*. Davis acting for Coughlin and the defendants, sends this letter on to Cantlen with the request that he answer the letter direct, *giving them the information requested*, and allowing defendants a copy of the letter. Davis, familiar with the binder, makes this request of Cantlen, concerning expiration date of the coverage, on November 5, 1946, *after the binder had by its terms expired*. Cantlen makes reply under date of November 18, 1946, stating that the coverage expires September 1, 1947, which is the end of the full policy year. Yet defendants now contend this entire exchange was only a "clue" which they were not obliged to notice.

CONCLUSIONS.

It is again noted in conclusion that third party defendant is involved in this litigation only upon a relatively narrow issue of fact, separate and apart from

the basic controversy between plaintiff and defendants. Whatever may be the final determination of that basic controversy, this third party defendant submits that the factual issues as to its actions and conduct in the premises have been properly resolved in its favor by the trial Court on more than sufficient evidence, that such findings must be sustained, and that the judgment in favor of third party defendant should be affirmed.

Dated, San Francisco, California,
February 28, 1951.

Respectfully submitted,
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No. 12,722

IN THE

**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK (a corporation), and
BAYLY, MARTIN & FAY, INC. OF CALI-
FORNIA (a corporation),

Appellees.

Upon Appeal from the United States District Court of the
Northern District of California, Southern Division.

**APPELLANTS' REPLY TO
BRIEF OF APPELLEE, THE FIDELITY AND CASUALTY
COMPANY OF NEW YORK,
and
BRIEF OF APPELLEE, BAYLY, MARTIN & FAY, INC.,
OF CALIFORNIA.**

NORMAN A. EISNER,
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FILED
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Upon Appeal from the United States District Court of the
Northern District of California, Southern Division.

REPLY TO BRIEF OF APPELLEE, THE FIDELITY AND
CASUALTY COMPANY OF NEW YORK.

Appellee's brief clouds the issue but does not meet it. It avoids directly and clearly answering the points made by appellants. This action is for a fixed and guaranteed rate of premium. It stands or falls on the basis and theory that Policies SPL-20968 and 20950 were offered for acceptance and accepted as flat or guaranteed premium rate policies. It is conceded, as indeed it must be, that there had to be an offer and

acceptance of these policies and that the offer and acceptance had to conform.

Appellants in the opening brief maintained that neither of the essential elements of a contract was present; that the policies were never offered for acceptance as flat or guaranteed rate policies, but were only offered in conjunction with a retrospective agreement; that appellants did not accept the offer as made by appellee, never had the privilege of accepting and never accepted policies bearing a \$2.20 guaranteed rate of premium.

Appellee insurance company had a right to decline to write insurance for appellants except on specified terms and appellants had the corresponding right to accept or reject those terms. In the opening brief appellants set forth in detail what they claim and claimed to be conclusive evidence that these policies were never independently offered and were never open for acceptance as guaranteed premium rate policies. Appellee has completely failed to answer the argument. We shall demonstrate this by a brief reference to the points made.

THE INSTRUMENTS.

We first referred to the instruments themselves. The policies and the retrospective agreement bear the same date. They refer one to the other. They were simultaneously delivered to Bayly, Martin & Fay. The retrospective agreement recites specifically that ap-

appellee insurance company is *“about to issue”* Policy SPL-20968 *“upon the security of this agreement.”* It further recites that the company *“has proposed the adoption by agreement of the Retrospective Rating Plan hereinafter set forth in modification of the premium provisions of the said policy, and such proposal having been accepted by the insured.”*

We ask how it is possible to contend that Policy SPL-20968, the primary policy, was offered for acceptance independently of the acceptance of the Retrospective Rating Plan. We look in vain for any answer to this question in appellee's brief.

As we understand appellee's position, which is by no means clear, it is that when the policies were delivered to Bayly, Martin & Fay, approximately October 1st or 2nd, 1946, the policies were thereupon issued and became immediately effective. This would mean that the policies were offered for acceptance by the insurer on a guaranteed premium basis, a flat \$2.20 rate, and that they were accepted on that basis.

The instruments on their face show that such was not the fact. Let us assume that Policy SPL-20968 covered a risk that was not covered by the former policy. Let us assume that after delivery to Bayly, Martin & Fay a loss was suffered by appellants of this particular added nature. Let us further assume that appellants had sought to hold appellee liable on the theory that when Policy SPL-20968 was delivered to Bayly, Martin & Fay in conjunction with the retrospective agreement it thereupon became an issued and

binding policy upon appellee, without acceptance by appellants of the Retrospective Rating Plan. Such a contention or claim upon the part of appellants in the face of the documents themselves would have been deemed preposterous. The answer would have been obvious. The documents show upon their face that these policies were only to be effective if the agreement covering the Retrospective Rating Plan was accepted in modification of the rate set forth in the policy. Yet, appellee has no more basis to collect premiums upon the policies in this action on the theory that they were in effect, than appellants would have had to recover in the hypothetical case set forth.

THE TESTIMONY DISCLOSES THAT THE POLICIES WERE ONLY OFFERED IN CONJUNCTION WITH THE RETROSPECTIVE AGREEMENT AND NOT ON A GUARANTEED BASIS.

On pages 13 et seq., of the opening brief, appellants set forth testimony showing that appellee positively refused to write this insurance on a guaranteed rate basis. It positively refused to offer a \$2.20 guaranteed rate. The New York office was insistent upon a Retrospective Rating Plan. Cantlen tried in vain to obtain a guaranteed quotation from appellee.

What answer does appellee make? Can appellee point to anything that would support a finding that appellee was willing to write the insurance on a guaranteed rate of \$2.20? Absolutely not. If not, then clearly these policies were not offered or open to acceptance on such a basis.

According to appellee, when the policies were delivered to Bayly, Martin & Fay, the insurance was thereupon renewed. According to appellee, a binder having been issued pending renewal, as soon as these policies were physically delivered to Bayly, Martin & Fay the renewal was effected and the binder was supplanted. According to appellee, the execution of the retrospective agreement was optional with the insured. How then does appellee explain the letter of C. L. Anderson, Resident Manager (Ex. RR) written on December 11, 1947, clearly showing that so far as appellee was concerned the renewal had not been consummated or effected and that it could only be consummated by execution of the retrospective agreement, a condition that had been adamantly insisted upon? We look in vain in appellee's brief for any mention or explanation.

All of the testimony, without exception, is to the effect that the execution of the agreement embodying the Retrospective Rating Plan was a condition that was adamantly insisted upon by appellee throughout the negotiations and throughout the period that the policies are claimed to have been in effect, and that insurance was never offered by appellee on any other basis.

We would also call attention to the following statement in the brief of Bayly, Martin & Fay. (p. 6.)

“Immediately after receiving the policies and the retrospective agreement from the plaintiff Cantlen went to see Coughlin taking with him

the proposed retrospective agreement but not taking the policies because Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed; the policies were finally physically delivered to the defendants on or about October 27, 1947, at which time Cantlen was still arguing with the plaintiff that they should not charge the \$2.00 standard rate (Plaintiff's Exhibit 18)."

THERE WAS NO ACCEPTANCE OF THE POLICIES.

We know that the Retrospective Rating Plan was refused. The agreement was not signed. The only offer that appellee ever made concerning these policies was rejected. Unless these policies were offered for acceptance on a guaranteed premium basis and independently of the retrospective agreement, and unless an offer of that character was accepted, it is just impossible for these policies to have become effective. If there was an offer of these policies independently of execution of the retrospective agreement, we ask appellee to point to anything whatsoever in this record to indicate it. Cantlen was continuously trying to get appellee to quote a flat or guaranteed rate of premium upon which it would write the insurance, and appellee consistently refused to do so. Yet, according to the position of appellee, policies on a guaranteed premium basis had been both issued and accepted.

Appellee has not answered and cannot answer these questions in a manner consistent with the judgment in this case:

1. Did appellee ever offer insurance to appellants on a \$2.20 guaranteed basis?
2. Were Policies SPL-20968 and 20950 ever offered for acceptance on any basis other than in conjunction with the execution of a retrospective agreement embodying a Retrospective Rating Plan?
3. The retrospective agreement and Retrospective Rating Plan having been rejected, when and how could the policies ever have become effective?

It is respectfully submitted that appellee does not and cannot answer these questions. The evidence and testimony are undisputed

1. That appellee never offered insurance on a \$2.20 guaranteed or any other guaranteed basis.
2. The policies were only offered in conjunction with the retrospective agreement embodying the Retrospective Rating Plan.
3. The offer made was never accepted.

THE INCONSISTENT CONDUCT.

Appellants, in their opening brief, have pointed out in detail the repeated instances of conduct on the part of appellee and Bayly, Martin & Fay wholly inconsistent with the effectiveness of these policies. The only explanation of appellee is that there was to be a final audit. According to appellee, the insured could pay any rate of premium, however erroneous, the payments made would be accepted without protest and the company would depend on discovering the error on final audit. The final audit, in the case of policies bearing a flat or guaranteed rate of premium, such as these policies are asserted to have borne, is nothing more than a final check to ascertain that the premium has been paid on all gross receipts. The final audit has absolutely nothing to do with the rate of premium. The idea that premiums at the rate of the former policy should have been repeatedly received and processed, broken down, by Bayly, Martin & Fay, the agent of the insurance carrier for the collection of the premiums, and in turn accepted and approved by the insurance carrier itself, when, according to appellee, policies bearing a rate of premium almost double that received had been in effect from September 1, 1946, is just incredible. The fact that there was to be a final audit, as is true in the case of all policies in which the rate is to be applied to gross receipts, is neither an answer nor explanation.

APPELLEE'S STATEMENT OF THE CASE.

We regret to be compelled to state that appellee's statements and recitals are in many instances confusing and inaccurate.

Appellants in their opening brief (pp. 33-37) demonstrated that the filing of Policy Number SPL-20968 with the Interstate Commerce Commission and Public Utilities Commission on August 27, 1946, has no bearing on this case; that such a filing is made as a matter of course when a binder is issued; the coverage is arbitrarily given a number, and if and when a policy is issued it will be given that number. Appellee does not answer or challenge any of the statements therein made. It makes allegations, however, that unless noted are exceedingly misleading. For example, at the end of the second paragraph on page 2 appellee states:

"At the same time (when the binder was issued), and at appellants' agent's request, appellee made the required legal filing with the Railroad Commission and I.C.C. stating appellants were covered with the new primary Policy No. SPL-20968, so that they could continue their motor transport business uninterrupted."

The implication is that the registration of the coverage under No. SPL-20968 was a registration of the particular primary policy of that number for which the premium is now claimed. The fact, of course, is that the number was listed because of the issuance of the binder and had reference to no particular policy.

The intent was that if a policy should be issued and accepted it would be given that number.

In the immediately following paragraph (p. 2) appellee states that "in the latter part of September, 1946, appellee wrote up and delivered to the agent two new policies, effective from September 1, 1946, which, accordingly, superseded the binder." The only wholly true statement in the foregoing sentence is that appellee wrote up and delivered to the agent two new policies. Appellee fails to state that there was jointly delivered with the policies a retrospective rating agreement. The statement that the policies were effective from September 1, 1946, is misleading and begs the question. The new policies could only become effective if the condition upon which they were offered was complied with and accepted—the signing of the retrospective agreement. Appellee then adds (just as if a matter of course) that these policies "accordingly superseded the binder." The policies could and would only supersede the binder if they became effective by offer and acceptance on the same terms.

The very next sentence is "the agent knew that the new insurance, evidenced by both the primary Policy SPL-20968 and the excess Policy SPL-20950, together called for payment of a total premium at the rate of \$2.20 per \$100.00 of gross earnings subject to final audit." Of course, the agent knew the rate set forth in these policies. It also knew that the rate set forth in these policies was modified by a collateral agree-

ment simultaneously submitted. The words "subject to final premium audit" are misleading. All policies with the premium rate based on gross earnings are subject to final audit to determine whether gross earnings have been correctly reported. If the rate of premium is a guaranteed or flat rate, it is applied throughout, but if the premium is modified by a Retrospective Rating Plan, fluctuating with loss experience, then only will the rate to be applied depend on loss experience indicated on final audit.

We call particular attention to the next thoroughly untrue and misleading statement:

"At the same time a proposed retrospective agreement, which, even if signed, had no effect on insurance except as to the rate applicable to the final premium audit at the end of the policy period, was delivered to appellants with the option of signing the same or subjecting the new policies to cancellation should appellee elect so to do."

The statement is aggravatingly false. Appellants had no option of signing the retrospective agreement. The retrospective agreement had to be signed or there would be no agreement. The effect of signing the agreement was to make the rate of premium dependent on loss experience. Appellee would consider renewing the insurance on no other basis. The amount of premium would of course have to be determined at the end of the policy period, for it would then be that the loss experience would be known. The suggestion that the policies were offered and accepted on a

flat or guaranteed basis, and that the execution of the retrospective agreement was optional, is wholly contrary to the instruments themselves and all of the evidence.

The next sentence indicates that appellee cancelled these particular policies. Appellee cancelled the coverage that since the issuance of the binder had been identified by Policy Number SPL-20968. This was the number that was registered when the binder was issued, and necessarily when the coverage was cancelled the reference was to the same number. The reference does not signify or indicate that any policy bearing that number had ever actually become effective, by issuance and acceptance.

On page 24 of its brief appellee again makes a deceptive and misleading statement:

“It should be noted in passing that the parties understood that no cancellation notice of the binder had been necessary since it had been superseded by the policies which were issued effective September 1, 1946.”

Let us consider this statement in the light of the undisputed facts. The implication is unmistakable that if the policies had not been “issued” cancellation notice of the binder (by that description) would have been forwarded to the Commissions. This implication could not be further from the truth. When the binder was issued it was necessary to assign an arbitrary policy number for the purpose of the filings before the Commissions. The Commissions would not accept the registration or filing of the binder alone.

The testimony of Mettalia conclusively establishes this.

“When binders are issued we automatically add these assigned policy numbers to satisfy the ICC and Railroad Commission. *They do not accept them otherwise.*” (Tr. p. 120.)

Since it was necessary to assign a number for the purpose of the filings, it was likewise necessary to refer to that same number in the event of cancellation. It would have been just impossible to have given cancellation notice in any other manner. The above statement of appellee and its implications are totally erroneous and misleading.

Appellee next refers to the final audit of gross earnings made in April, 1947. It is intimated that Davis, when certifying to the correctness of the figures, did so upon a paper upon which the policy number appeared and a notation as to the premium rate. Appellants have fully covered this phase in their opening brief. (pp. 43-44.) Mr. Challburg testified that the only thing he showed Mr. Davis was the amount of gross receipts for his approval, and that there was nothing else on the document at the time it was shown to Mr. Davis. Mr. Davis testified that all he looked at and checked were the figures, but in perfect honesty testified that he could not at the date of testifying remember whether there was or was not anything on the paper in addition to the figures.

Appellee next states that after final audit it rendered a bill to appellants. It neglects to state that it

rendered a bill to Bayly, Martin & Fay and that Bayly, Martin & Fay disputed the bill and contended that appellee had no right to charge the \$2.20 rate of premium. It neglects to state that Bayly, Martin & Fay did not send a bill to appellants; that it was not until October 27, 1947 that a bill was presented to appellants. Appellee neglects to state that at the time of delivering the bill to appellants Cantlen dictated a letter for appellants to sign denying liability. This is a highly significant letter and it is not mentioned by appellee. If these policies were in effect on a guaranteed basis, then why did Cantlen contend that there was no basis for a charge and why did he cause appellants to write to Bayly, Martin & Fay as follows:

“During the aforementioned period, namely, from September 1, 1946 to January 21, 1947, we attempted through you to negotiate a renewal arrangement with the Fidelity Insurance Company, but in view of the arrangements which were offered to us we found it inadvisable to continue with this company. At no time did we agree to a rate of \$2.20 as against our former rate of \$1.223.”

It will be recalled that Cantlen testified that the statements in the foregoing letter and dictated by him were true. (Tr. pp. 278-279.)

The next statement of appellee (p. 4) is that appellants “reported a total of ninety-eight claims to appellee for handling under the two policies which appellee had issued.” This statement is just a half truth. Appellants reported the claims after Septem-

ber 1, 1946, but not under these policies. Appellants were covered by insurance and paid premiums. They certainly would report claims, but there is no basis for the assertion that the claims were reported under these policies. (Tr. pp. 121-122.) For all claims, including all suits based on claims, arising between September 1, 1946 and January 21, 1947, appellee paid out, including attorneys' fees, a total of \$7800.00, and collected from appellants in premiums \$9132.12.

Finally, appellee states that a law suit filed on a claim arising between September 1, 1946 and January 21, 1947, was submitted to appellee after October 22, 1947. Again it is recited that the reference was under these policies. Of course, appellants would refer to appellee any actions on claims arising during the period for which they had paid premiums in the sum of \$9131.12. Likewise, appellee was bound to defend the actions notwithstanding appellants' refusal to pay additional premiums.

APPELLEE'S REVIEW OF THE EVIDENCE.

Appellee's review of the evidence to support the judgment is literally filled with statements and misstatements that are calculated to divert attention from the real issues in this case. Assumptions are indulged in that beg the issue. It is impossible to take up each sentence and expose its falsity and deceptiveness, but we shall consider a number in order to illustrate what permeates the entire narrative.

The issue in this case is whether or not these policies were effective from September 1, 1946 to January 21, 1947, for only if they were in effect can premiums be due under them. The words "issue" and "issued" are repeatedly used by appellee. The words are repeatedly used in a sense connoting the preparation and physical delivery of a policy to Bayly, Martin & Fay. No one disputes that the policies were written and delivered to Bayly, Martin & Fay. However, they were written and delivered in conjunction with a retrospective agreement. The words "issue" and "issued" ordinarily refer to policies that have become effective by delivery and acceptance, and both these essential factors are absent in this case.

If appellee had an answer to the salient questions in this case, it would have considered the arguments presented in appellants' opening brief, instead of attempting to evade and confuse the issues.

The first question is whether these policies were offered for acceptance by appellee independently of the retrospective agreement; whether they were open for acceptance independently of a Retrospective Rating Plan embodied in the agreement and on a flat or guaranteed basis. The second question is whether, if the policies were offered for acceptance on such a basis, they were accepted by appellants. Appellants' opening brief adheres strictly to a consideration of these questions.

Can appellee explain how these policies were open for acceptance on a flat or guaranteed basis in the

face of the provisions in the agreement and the circumstances of their joint delivery? Can appellee answer the definite testimony that appellee's home office would only consider writing this insurance on a retrospective basis; that a guaranteed rate would not be quoted, that the rate of \$2.20 would not have been considered as a guaranteed rate of premium? Can appellee point to any evidence whatsoever that the condition and ultimatum of execution of the retrospective agreement was ever withdrawn? Can appellee point to any evidence that appellants ever agreed to accept policies with a \$2.20 rate of premium?

Here are unanswerable facts. They are coupled with conduct on the part of appellee utterly inconsistent with an intent or understanding that these policies or a \$2.20 rate of premium were effective. Bayly, Martin & Fay was an experienced broker. Can appellee explain how it was that Bayly, Martin & Fay submitted the retrospective agreement to appellants and held the policies until October 22, 1947 because the policies were only offered for acceptance in conjunction with the agreement?¹ Can appellee explain the contention made by Bayly, Martin & Fay that appellee was not entitled to charge the \$2.20 rate because the policies were never offered on such a

¹The brief of appellee, Bayly, Martin & Fay, seeks to justify its conduct on the ground that the Fidelity issued its ultimatum that the "policies would have to issue on a retrospective plan basis", and Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed.

basis and the insured had never agreed to pay such a rate?

These are the questions and they are not answered. Instead, appellee, in addition to repeatedly asseverating that the policies were issued (in the sense of having been written and delivered), makes the following contentions:

1. The policy number was listed with the Commissions at the time the binder was issued. It is contended that the listing of the policy number when the binder was issued is evidence that these particular policies were issued and accepted. The lack of significance of such listing at the time of issuance of the binder is covered in appellants' opening brief and the facts therein stated are not challenged.

2. Appellants knew that they had to be covered by insurance and therefore must have accepted these policies. The undisputed evidence that the policies were not offered for acceptance except on a retrospective basis is ignored. Of course, appellants knew they had to be covered by insurance pending negotiations for renewal. A binder was issued for that purpose. They were advised that the binder delivered to them would constitute their policy, their evidence of coverage pending negotiations for renewal. They paid premiums throughout the period here involved on the assumption that the rate of premium of the expired policy was applicable. They received no other policy than the binder. The binder recited that it was for sixty days. Let us assume that the retrospective agree-

ment and policies had not been delivered to Bayly, Martin & Fay; and further assume that a loss had occurred after the expiration of the sixty days mentioned in the binder, and that appellee had refused to recognize liability on the ground that the coverage had expired at the expiration of the sixty days set forth in the binder. In the light of continued payment and acceptance of premiums at the rate of the former policy, conduct of insurer and insured following the sixty days identical with that during the sixty day period, and the continuation of negotiations for the renewal of insurance, no Court in the land would release appellee from liability. Beyond any question, a Court would hold that the binder had been extended by implication, or that the coverage of the former policy had been extended by implied agreement. Appellee cannot prove either offer or acceptance of these policies by the fact that the binder was for sixty days and appellants required insurance coverage.

3. Appellants presented claims for losses suffered between September 1, 1946 and January 21, 1947. Certainly appellants presented claims. They had paid premiums and appellee had accepted premiums, and it would have been anomalous if appellants did not present claims and equally anomalous if appellee had refused to accept responsibility for the claims. The conduct shows a recognition by both parties of the existence of coverage, but not of coverage under these policies.

The evidence that these policies were not offered or accepted on a guaranteed basis, that they never became effective is direct and uncontradicted. The circumstances relied upon by appellee are not inconsistent with the direct and uncontradicted evidence and do not tend to prove the contrary.

Faced with evidence that cannot be answered or explained away, appellee argues that in some mysterious manner appellants were given the right to accept the policies independently of the retrospective agreement, and that the execution of the retrospective agreement was optional. In the face of the undisputed facts and circumstances there is no basis for such a contention. The documents show and the undisputed testimony demonstrates that the execution of the retrospective agreement was a positive demand, an ultimatum, never relaxed, continuously and adamantly adhered to. There just wasn't any option.

To demonstrate the manner in which appellee adroitly seeks to evade and confuse the issue, we shall consider a number of the statements made. Consideration of each such statement would require the brief to be unduly prolix. It requires much less space to make an evasive or illogical statement than to analyze and expose it.

At the outset (p. 6) appellee misstates the issue. It states:

“Since it is undisputed that appellee covered appellants with insurance, there is no issue as to the existence of *the contract* between the parties.

The issue is whether appellants should pay appellee on a final audit premium balance of \$7841.99 computed at the rate of \$2.20 for \$100.00 of appellants' gross earnings in the manner set forth in two new insurance policies which *were effective* from September 1, 1946 to January 21, 1947, or whether, having voluntarily paid appellee \$9131.12 computed at the rate of \$1.223 for \$100.00 as set forth in an old policy which had expired September 1, 1946, appellants owe nothing more to appellee."

There certainly is an issue as to the existence of "the contract", if by these words appellee refers to the policies in question. The issue is not whether appellants owe more premiums, on the assumption that Policies SPL-20968 and SPL-20950 were effective from September 1, 1946 to January 21, 1947, but whether or not these policies were in effect during that period. The \$9131.12 was not paid as a voluntary payment on account, but as full premium for the coverage that was temporarily effective pending negotiations for the issuance of renewal policies.

Appellee (pp. 7-8) states that the insurance was undertaken in 1941 with the understanding that the premium rate would be adjusted annually. The rate could be adjusted annually, but this does not mean that appellants would not have to agree to and accept any proposed adjustment. Even when appellee was willing to renew at the former rate, Cantlen had to take up with appellants and obtain their approval to renewal at the same rate. (Tr. p. 307.)

Appellee refers to negotiations between Cantlen and Mettalia. They did negotiate, but appellee's home office insisted from the start on renewal on a retrospective basis, and Cantlen never received anything except a Retrospective Rating Plan to submit to appellants. Cantlen never reached the point where he could submit a guaranteed rate of premium to appellants for their acceptance. He had first to get appellants to accede to the absolute and insistent demand that any rate be subject to a Retrospective Rating Plan. This is what he spoke to Coughlin about. That was the agreement he submitted. It was useless to discuss rates with Coughlin unless Coughlin was willing to accept the plan upon which appellee was insistent.

“Q. From the time of your original negotiations with Mr. Cantlen the month of August, then, when you talked to him about rates, you were talking to him about a rate that would be adjusted according to the loss experience of the insured?

A. That is correct.” (Mettalia, Tr. p. 130.)

Cantlen at no time during the negotiations was able to obtain any offering from appellee on a guaranteed premium basis. Appellee would only consider the business on a retrospective basis. On August 15, 1946, appellee told Cantlen that the home office was insisting upon renewal on a retrospective basis. Cantlen then discussed a Retrospective Rating Plan with Coughlin and he was not pleased with it. Cantlen again took the matter up with Mettalia and O'Malley,

and they again told him that the company was adamant, and before the policies and retrospective agreement were delivered to Cantlen appellee gave a definite ultimatum that this was the only basis upon which the business would be taken. (Tr. pp. 262-263.)

The submission of a rate to the Bureau for approval was preliminary. It bound neither insurer nor insured. Appellee was never willing to issue a policy at the rate submitted, except on a Retrospective Rating Plan. Mettalia testified that he told Cantlen, who was endeavoring to obtain a guaranteed cost premium:

“A. That I would try to work up some guaranteed cost basis, but certainly under no condition would the rate of \$2.00 be acceptable as a guaranteed cost policy * * * and that if it did go on a guaranteed cost basis it would be in excess of \$2.00.” (Tr. p. 128.)

No guaranteed cost basis was worked out or submitted to Cantlen. The home office would not permit it.

On page 11 appellee makes this statement:

“As far as appellee was concerned, at no time did appellants instruct their broker not to renew the insurance which appellee was willing to issue at the \$2.20 rate.”

Appellee was never willing to issue the insurance at the \$2.20 rate except on a retrospective basis. Appellants were never willing to accept insurance on a

retrospective basis and insurance on a \$2.20 guaranteed basis was never submitted to them.

At the bottom of page 12 and top of page 13 appellee again refers to the filings with the Commissions. A repeated endeavor is made to give these filings a distorted significance. The filings always take place, as a matter of course, whenever a binder is issued. Cantlen did not even have to ask that this be done. Appellee then makes this statement: "Then from and after September 1, 1946, the new policies were in existence but not actually written up." It is difficult to understand what appellee means by this statement. A binder was issued and the binder had been given a policy number, but neither rates nor terms had been agreed upon. They were never agreed upon. Appellee is in effect stating that a contract existed although there was no meeting of minds and nothing had been agreed upon. The number assigned to the binder would be assigned to any renewal policy that might be subsequently issued and accepted. Policy SPL-20968 was a proposed renewal policy, and was as a matter of course assigned that number. However, it was never proposed or submitted for acceptance except in conjunction with acceptance of a retrospective agreement on a retrospective basis.

The argument (p. 14) that after having made the filings with the Commissions, appellee had the right to believe that appellants had accepted "the new insurance" (referring apparently to these policies), is, for the reasons already set forth, without the slightest basis.

Appellee refers to a declaration of policy, as if this were something that in this instance could occur independently of execution of the retrospective agreement. The signing of the agreement and the declaration, or legal effectiveness or acceptance of the policies, were indissolubly connected. This is shown by the following testimony that appellee does not quote (Tr. p. 244):

“Q. So you told him that the company was insisting on your declaration of the policies, as you put it, is that correct—the signing of the retrospective agreement and the declaration of the policies?

A. Correct.”

If we assume that the policies were effective when delivered to Bayly, Martin & Fay, then the insurance would have been renewed. Yet, thereafter, and as evidenced by the letter of C. L. Anderson, as late as December 11, 1946 (Def. Ex. RR) appellee was insisting and demanding that the insurance *be renewed* and fixed a time limit within which such renewal must be effected.

Appellee contends that although the policies were only offered in conjunction with a retrospective agreement, and appellee was unwilling to write the insurance on any other basis, in some inexplicable manner the policies became immediately effective on a guaranteed basis. The statement is made that the proposed retrospective agreement would have no effect on the “issuance” of the insurance. Appellee would disre-

gard, and its argument is absolutely inconsistent with, the proven facts in this case, which are just unanswerable. Appellee does not attempt to deny or dispute that the uncontradicted evidence is that from August, 1946, when renewal of insurance was first discussed, appellee refused to renew except on a retrospective basis. Appellants were never offered insurance on any other basis. Appellee never said to appellants: "We shall now write the insurance on a \$2.20 guaranteed basis. You accept policies written on this basis and take under consideration the optional execution of a retrospective agreement that will change the rate according to your loss experience." Such an offer was not made and the instructions of appellee's home office prohibited it from being made. On the other hand, appellants never accepted such offer. Appellants were no more willing to accept a \$2.20 guaranteed rate than appellee was willing to offer it. The argument of appellee assumes that appellants were willing to accept policies at that guaranteed rate, and that policies at such rate would remain in effect until appellee should see fit to cancel same. According to appellee, if it had not seen fit to give notice of cancellation in December, 1946, these policies would have remained in effect indefinitely. On such theory, the insurance had been renewed on a guaranteed basis of \$2.20. Nothing could be further from the fact. There was neither such an offer nor such an acceptance. Appellee would have the parties bound by a contract to which neither had agreed.

Appellee in many instances has run separate portions of the record together as if it were a single context. An instance of this appears on page 18. It would seem therefrom that Coughlin had the retrospective agreement and the policy delivered for examination at the same time, and that he failed to read either. The fact is that the policy was not shown until October 22, 1947, almost ten months after coverage by appellee had ceased. Coughlin did not read the retrospective agreement because the plan had been explained to him and he knew that he was not interested. The letter denying liability that Cantlen dictated (Ex. 18) was signed by Davis.

We respectfully direct attention to the following sentence (p. 19):

“Appellants’ broker, who had accepted the policies from appellee and who had seen the \$2.20 rate specified therein, retained possession of the policies for appellants so informing appellants who, in turn, knew that insurance from and after September 1, 1946, was absolutely necessary to carry on their transport business without interruption.”

Bayly, Martin & Fay received the policies with the agreement. It did not accept them. They had been received subject to acceptance only on a retrospective basis. Appellee gave it no right to accept them on any other basis, and according to Cantlen’s own testimony appellants had never agreed to the retrospective agreement or a \$2.20 guaranteed rate of premium. If Cantlen told Coughlin that he had received the policies

with the agreement, of which he was by no means positive, the reference could only have been to policies that were referred to in and which would become effective provided Coughlin was willing to sign the retrospective agreement. Cantlen retained possession of the policies because he was still trying to induce Coughlin to accept the agreement. The negotiations were still pending.

The failure to collect the deposit premiums was but one of the several instances of conduct on the part of Fidelity and Bayly, Martin & Fay inconsistent with the theory that these policies became effective when delivered to Cantlen. It is not a question of when measures to enforce collection would ordinarily be taken against a delinquent debtor. It is the failure in this instance to pursue the usual procedure of billing and collecting deposit premiums. Bayly, Martin & Fay was the agent of Fidelity for collection of the premiums, and if these policies had been deemed in effect the deposit premiums would have been immediately billed and paid. This was the procedure followed in all prior years.

Appellee repeatedly refers to the premium to be charged on final audit. It is an element introduced solely to create confusion. A final audit would indicate whether the insured had paid the correct *amount* of premium. It would not affect or indicate the *rate* of premium. In the case of a guaranteed rate of premium, the fixed rate would be at all times known and at all times applied. The rate of \$1.223 would not be applied during the term of the policy and a rate

of \$2.20 on final audit. Bayly, Martin & Fay would not have accepted and processed premiums paid at the rate of \$1.223, unless that was *the* premium rate. In the case of a Retrospective Rating Plan the rate will depend on loss experience during the policy term. These policies are claimed to have been effective from September 1, 1946 at a guaranteed \$2.20 rate, and admittedly not on a retrospective basis.

The final audit in this case developed that appellants had correctly reported their gross receipts. The figures were submitted to Davis for approval. When there was written or who wrote the words upon the audit sheet "Assured refuses to sign retrospective agreement—retrospective rate not to be used", does not appear. This was apparently the first time that such a contention was thought of. Davis looked only at the figures submitted to him. Three years later he could not honestly state that he remembered what, if anything else, was on the sheet on which the figures appeared, and he so testified. However, Challburg testified definitely that there was nothing on the sheet shown Davis other than the gross receipts. In refutation of the endeavor to make it appear that Davis approved the notation as to the rate of premium, we quote Challburg's testimony:

"Q. Were there any extensions or anything upon the document you showed to Mr. Davis other than the gross receipts for his approval?

A. That is all.

Q. The only thing you showed Mr. Davis for his approval were gross receipts whether or not

they were correct, as you took them from the books of the California Motor Transport Company?

A. That is right.

Q. And Mr. Davis then appended his signature approving your figure as correct?

A. Yes." (Tr. p. 171.)

Appellee refers to the payments made by appellants as "voluntary payments", and as having "nothing to do with the balance of the premium due appellee as shown by final audit." These again are simply words calculated to lend confusion. The payments were no more "voluntary" than the payment of premiums by any insured. Appellants were not making and Bayly, Martin & Fay was not accepting as Fidelity's agent, premiums at a rate that was approximately half of that at which the insurance is asserted to have been actually carried. The final audit had absolutely nothing to do with the rate.

Appellee states that after this final audit it billed the broker and that the broker in turn billed appellants. What happened was that appellee billed the broker and the broker contended that the bill was unjustified and out of order. The broker did not bill appellants until October 22, 1947, and then told appellants not to pay the bill and to write the letter Cantlen dictated denying liability. Appellee refers to Exhibit 17, a letter addressed by Bayly, Martin & Fay to appellants, making a demand for additional premium. Although the letter is dated August 7, 1947, it was not mailed and was only delivered on October

22, 1947, at the time that Cantlen dictated and had appellants sign Exhibit 18.

On page 26 of its brief appellee sets forth the argument made to Cantlen in justification of the charge now sued upon. The argument is an admission that these policies were not written on a guaranteed basis. We call attention to this statement:

"The broker was clearly told by appellee 'that the company would not have issued the policies at a lower rate on a guaranteed basis, and that if the insurance company issued the policies on a guaranteed basis they would have insisted upon a rate of \$2.20'."

The argument is a frank and unqualified admission that the policies were not in fact issued on a \$2.20 guaranteed basis. The present action is based on the claim that the insurance company *did issue* the policies on a guaranteed basis. If this had been true, appellee's contention in justification of the charge made would not have been that *if* the policies *had been written* on a guaranteed basis the guaranteed rate would not have been less than \$2.20.

Repeated efforts are made to place a distorted significance on the presentation of claims. The claims were not presented under these policies. The question in this case is not whether or not there was insurance, but whether insurance existed under these particular policies. If insurance existed at all, appellants were entitled to present claims and refer for defense actions upon claims.

Let us assume, again, that during the binder period, and before appellee had offered any policy of insurance, appellants had determined there was no hope of negotiating satisfactory coverage with Fidelity and had placed their insurance elsewhere, or that Fidelity had determined that it did not want to offer any insurance to appellants. Certainly, all claims which had arisen from the beginning of the binder period to the date of termination of negotiations would have had to be paid or defended by Fidelity. Exhibit 9 discloses that a claim arose on September 1, 1946, the very first day of the binder period. Most assuredly appellants were entitled to have that, and all similar claims defended, whether or not a policy was ultimately offered and accepted.

Appellants unquestionably had the right to expect and demand that their claims be paid or defended. Insistence thereon did not constitute a recognition of the disputed policies. The entire conduct of appellants was consistent with their present position, that they were covered not by the policies, but by the binder, extended by implication, or an implied extension of the former policy. Appellee emphasizes the fact that appellants referred claims to it after they knew of the demand for additional premiums and ask this Court to accept such reference as a ratification of the policies. It cannot have such an effect. Appellants upon receiving notification of the demand for additional premiums, denied liability therefor. They maintained that they had fully performed their contract by paying premiums at the rate they understood was

in effect. They demanded like performance of Fidelity. The acceptance by Fidelity of such claims, with the knowledge that appellants did not recognize the policies in dispute as their insurance coverage, but were relying on the binder or an implied extension of the former policy, may be construed to be an admission on the part of Fidelity that its obligation existed separate and apart from the policies. This is not a case in which one has accepted the benefit of a policy of insurance and has refused to pay the premium. This is a case in which there exists a dispute as to insurance coverage that was actually effective. Under these circumstances the presentation of claims by appellants and the acceptance of them by Fidelity cannot and does not amount to a ratification of the policies claimed to have been in existence by Fidelity. Rather, since appellants had considered that they had performed their obligation in full, and had so notified Fidelity, the recognition of the obligation to defend by Fidelity may more logically be construed as an admission of the validity of the position of appellants.

Even with respect to the claims themselves, appellee makes a misstatement:

“In making reports to appellee, appellants used regular forms approved by the National Bureau with policy numbers appearing on the forms in some cases, although not always.” (Appellee’s Brief, p. 38.)

The fact is that the policy numbers did not appear on the forms submitted by appellants. The testimony

of appellee, itself, establishes this fact. (Tr. pp. 121-122.)

ARGUMENT.

We turn now to appellee's arguments. Appellee does not attempt to prove that these policies were offered for acceptance on a guaranteed basis, or to answer the detailed argument of appellants demonstrating that these policies were only submitted in conjunction with the retrospective agreement. Appellee does not attempt to prove that appellants were ever willing to pay or agreed to pay a \$2.20 guaranteed rate of premium.

It is contended that by accepting the benefits of the policies, appellants became obligated to pay the premiums. The argument begs the question. Appellants claim that they were entitled to these same benefits under a former policy and binder, and that they paid and appellee accepted payment for these benefits at the rate of the former policy. Appellee's argument assumes that appellee made an offer and that appellants accepted that offer by taking its benefits. The first insurmountable difficulty is to prove the offer. This appellee does not and cannot do. The second difficulty is that the benefits enjoyed were not attributable to the asserted offer, but were benefits that had been enjoyed under a prior policy, for the extension of which a binder had been issued and for which benefits appellants paid at the rate of the former policy.

FINDINGS AND JUDGMENT.

Appellee asserts over and over that the findings are supported by substantial evidence, but completely fails to answer the arguments presented. Let appellee explain when or how the policies could have become effective in the face of the following undisputed facts:

1. Consistent refusal of appellee to consider the renewal of the insurance on a guaranteed basis.

2. Submission of the policies in conjunction with the retrospective agreement, which by its terms modified the rate set forth in these policies.

Can appellee point out when or how appellants or Bayly, Martin & Fay ever indicated that appellants were willing to accept policies bearing a \$2.20 rate of premium?

Can appellee explain the conduct of Bayly, Martin & Fay and Fidelity in connection with this insurance? If these policies had actually been in effect Bayly, Martin & Fay would have known it and so would appellee. There could not possibly have been this combination of errors:

Payment of the former premium by appellants.

Acceptance of the former premium by Bayly, Martin & Fay.

Acceptance of the former premium by appellee.

Retention of the policies by Bayly, Martin & Fay.

Contention by Bayly, Martin & Fay that appellee was not entitled to charge the additional premium.

Can appellee explain away the admitted argument of appellee in support of the charge made, that if it had written the insurance on a guaranteed basis it would have charged a \$2.20 rate?

When analyzed, the arguments of appellee are mere evasions. The findings of the Trial Court of the legal effectiveness of the policies are unsupported. After the Court's opinion it would have been a vain and useless act to present findings supporting a position at variance with the opinion.

Appellee argues that since the policies were in effect entitling appellee to the premiums claimed, the binder has nothing to do with appellee's claim. This argument again begs the question. Appellee just will not, undoubtedly because it cannot, squarely meet the issue in this case. Of course, if the insurance had been renewed, the renewal policies would have supplanted the binder. The point is that the insurance was not renewed by these policies. The policies were written and delivered to Bayly, Martin and Fay. In that sense only were they issued. With so much every one agrees. However, the policies did not become effective and supplant the binder, unless they were offered for acceptance on a guaranteed basis and accepted on that basis. This, the evidence does not support, and appellee simply evades the issue. The main question in this case is assumed. On the assumption that the policies were issued (in the sense of having become

legally effective) it is reasoned that they supplanted the binder. The fallacy is in the assumption.

Appellee in like manner argues that the retrospective agreement has nothing to do with appellee's claim. The contention is that the policies became effective without the signing of the retrospective agreement. To prove this contention appellee must do more than refer to some self-serving conclusions of Mettalia that the acceptance of the Retrospective Rating Plan was not a condition to the effectiveness of the policies. Appellee is faced with the following undisputed facts, which it seems necessary to repeat in order to demonstrate the repeated fallacies of appellee:

1. Appellee from the start of negotiations positively refused to consider the renewal of the insurance on a guaranteed basis.

2. Appellee from the start of negotiations insisted that the insurance be renewed on a retrospective rating basis.

3. The policies were written in conjunction with an agreement embodying a Retrospective Rating Plan expressly converting the rate of premium set forth in the policies into a fluctuating rate, dependent on loss experience of the insured.

4. The agreement and policies were simultaneously submitted to Bayly, Martin & Fay.

5. The Retrospective Rating Plan was refused.

The foregoing facts, which are of the essence, are undisputed and appellee simply ignores them. Testimony and evidence that show beyond any possible doubt that the signing of the retrospective agreement was a condition of renewal, set forth in appellants' opening brief, are unchallenged and unanswered. No attempt is made to explain how Bayly, Martin & Fay could have so grossly erred as to retain the policies, accept and process premiums at the rate of the former policy, refuse to send bills for additional premium to the insured and dispute any right on the part of appellee to charge premiums at a \$2.20 guaranteed rate.

On pages 52 and 53 appellee again combines testimony from various portions of the record, covering different times and matters, as if they were part of a single context. Portions of the record explanatory of what is set forth are omitted. For example, immediately following the portion of Cantlen's testimony quoted on page 53, there appears in the record the following question and answer, definitely showing that the premiums were only to become effective in conjunction with the retrospective agreement:

"Q. (Mr. Murman.) I would like to have you take Policy No. 20968, the primary policy, plaintiff's Exhibit 3, and point out to the Court where in that policy there is any reference made to the retrospective agreement.

A. It would not be necessary to be referred to in here because the policies were definitely issued with the understanding that the retrospective agreement would be entered into." (Tr. p. 295.)

At the bottom of page 53 appellee makes this argument:

“In view of the foregoing, appellee urges that the unexecuted retrospective agreement can be of no evidentiary value in this law suit since it never bound the parties and clearly, whether executed or not, was not intended as a condition to the effectiveness of the insurance which appellants concede covered them for all purposes.”

The agreement never bound the parties and neither did the policies, for the agreement and policies constituted a single offer, which was not open for acceptance in part. The statement or implication that appellants concede that they were covered by these policies is just a plain and bald misstatement. If the case of appellee were meritorious resort would not be had to such methods of argument.

On page 55 appellee contends that voluntary audits and deposit premiums had nothing to do with appellee's claim. The repeated payment of premiums at the rate of the former policy, the acceptance and processing of the payments by Bayly, Martin & Fay and the reports and remittances of Bayly, Martin & Fay to appellee, which it accepted and approved, are referred to as “voluntary audits.” The failure to collect any deposit the premiums is an irregularity and deviation from standard practice indicative, in the same manner as the other acts of conduct, that the policies were not considered operative so that it was in order to collect the deposit premiums.

The acceptance of premiums at the rate of the former policy has been referred to both as evidence that the rate in the policies in question was not effective, and also as a waiver and estoppel. Appellee's answer is again nothing but an assumption that begs the question. Appellee's argument is that policies had been issued to supersede the binder. In order to supersede the binder the policies had to be effective, and this is the very question in issue. Then follows this statement:

“So the policies alone determine the \$2.20 rate which was used in connection with the final audit in computing the amount on which the premium balance rests.”

Here again the argument is nothing but an assumption of the issue and another confusing reference to the “final audit.” If these policies determined that appellants were obligated to pay a \$2.20 rate, then that obligation existed from September 1, 1948. It did not arise in April, 1947, the date of the final audit. The acceptance of another rate, which was that of the former policy, as the basis for all premium earned from September 1, 1946 until January 21, 1947, was a clear indication that a rate of \$2.20 was not considered in effect. Appellee does not dispute the fact that Bayly, Martin & Fay was the agent of Fidelity for the collection of the premiums, and that its action in accepting and processing the payments was that of Fidelity.

The point of waiver and estoppel is not answered. The defense was pleaded and there was no finding

thereon. It is a meritorious defense. Appellee's conduct lulled appellants into the belief that they were covered by the rate of the former policy and that was the reason that appellants did not immediately place the insurance elsewhere.

Appellee contends that actions of Bayly, Martin & Fay, the broker, bound appellants by these policies. The actual lack of authority to do any such thing is undisputed. At no time was Bayly, Martin & Fay authorized to accept insurance without the submission to and express authorization of appellants. Cantlen testified that appellants never agreed to pay a \$2.20 rate of premium. What did Bayly, Martin & Fay do that bound appellants by these policies? It received the policies with the retrospective agreement. It retained the policies in its possession, while it was endeavoring on the one hand to get appellants to favorably consider acceptance of insurance with a Retrospective Rating Plan for premium, and endeavoring on the other hand to get appellee to quote a guaranteed rate of premium. Bayly, Martin & Fay told appellee that appellants were not disposed to accept a Retrospective Rating Plan. It never told and never had occasion to tell appellee that appellants would not agree to a \$2.20 rate of premium, as such an offer was never submitted to it for transmission to appellants, and the notification that appellants would not pay such a rate would have been a wholly gratuitous remark.

Reference is made to the fact that Bayly, Martin & Fay used the number SPL-20968 in reporting, re-

mitting and presenting claims to appellee. As pointed out in the opening brief, this reference has no significance. The number was assigned arbitrarily in August, 1946, when the binder was issued, and thereafter in all communications between Bayly, Martin & Fay and appellee the coverage was identified by that number. The lack of significance of the letter to the American Manganese Company has already been considered. As appellee was entirely ignorant of this communication, it could not by any possibility have been an act on the part of Bayly, Martin & Fay bearing on acceptance of these policies.

On page 62 appellee makes this statement:

“Failure to sign the proposed retrospective agreement as to the final audit premium would also appear immaterial where the conduct of the parties claim-wise showed each believed the insurance was in force as written until cancelled.”

The conduct of the parties does anything but show they believed the insurance was in force under these policies. The final audit did not affect the rate of premium. If the policy had been regarded as effective, Bayly, Martin & Fay, as *the agent of appellee*, would have collected the rate of premium that the policies called for. Claims were presented because coverage existed pending negotiations for renewal. The premiums for this coverage were paid and accepted. The claims for losses would have been presented by appellants in exactly the same manner, if the proposed policies and retrospective agreement had never been written. Coverage existed under the binder

or an oral extension of the former policy. That coverage would end if and when it was supplanted by new policies. It remained in effect until so supplanted or until cancelled. Under it appellants were insured, were entitled to present claims, and appellee was bound to accept and assume the care of such claims.

Appellants did not accept any benefits from or under these policies. They accepted only the benefits to which they were entitled under extended coverage pending negotiations for renewal. The contention that benefits were accepted under these policies again assumes that the policies became effective.

The final contention is that appellants ratified the acts of their agent, Bayly, Martin & Fay. Bayly, Martin & Fay did nothing that purported to bind appellants respecting acceptance of these policies. There was nothing for appellants to disavow. Appellee argues that Bayly, Martin & Fay accepted the policies by retaining possession of them. Possession was retained while endeavoring to get approval of the retrospective agreement. Appellee is not in a position to submit to the broker an agreement and policies for combined acceptance, approve the retention of the agreement while an endeavor is made to induce its acceptance by the insured, and at the same time contend that the retention of the policies constitutes an acceptance of them by the insured independently of the agreement.

CONCLUSION.

The appellee in this case is endeavoring to recover premiums on policies that the evidence positively demonstrates never became effective. The judgment in favor of appellee is inconsistent with the undisputed facts. If appellee had the right to collect premiums on these policies, then appellants would have had the right to enforce claims arising under them. We have previously posed the question, and here repeat it, because we believe it is crucial. Let us assume that these policies did not purport to cover the same risks as the former Policy 1457, but covered other risks and other equipment. Let us assume that a loss occurred of this added character, and that appellants claimed that these policies had been issued and accepted (not simply written and delivered, but issued in the sense of having become legally effective). Let us assume that appellee claimed that the documents, the testimony and the conduct of the parties showed conclusively that the policies were only to become effective when and if the retrospective agreement was signed, a condition that never was fulfilled. In the face of the undisputed evidence in the record of this case, such a contention on the part of appellants would have been deemed nothing less than outrageous. Once the clouds of confusion raised by appellee have been dissipated, the claim asserted by appellee will be deemed to be equally devoid of merit. Indeed, the rights are reciprocal and must stand or fall together.

United States Court of Appeals For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD.
(a corporation), et al.,

Appellants,

VS.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK (a corporation), and
BAYLY, MARTIN & FAY, INC. OF CALI-
FORNIA (a corporation),

Appellees.

Upon Appeal from the United States District Court of the
Northern District of California, Southern Division.

APPELLANTS' REPLY TO BRIEF OF APPELLEE
BAYLY, MARTIN & FAY, INC., OF CALIFORNIA.

A CONFUSING USE OF TERMS.

Bayly, Martin & Fay in its brief repeatedly refers to the "issuance" and "issue" of Policies SPL-20968 and SPL-20950. When appellee uses these terms it refers to the writing of the policies and the physical delivery of same to appellee, together with the retrospective agreement. At the bottom of page 9 of its brief appellee states "whether the policies in question,

that had been issued in fact, were or were not 'issued' as a matter of law is to be decided between plaintiffs and defendants and does not affect third party defendant." By the words "issued in fact", appellee can only mean that the policies were written and delivered to said appellee with the retrospective agreement. By the word " 'issued' as a matter of law" said appellee can only mean "issued" in the sense of having become legally effective, offered and accepted on the same terms, binding upon insured and insurer.

No one questions the fact that the policies were written and delivered to Bayly, Martin & Fay in conjunction with the retrospective agreement. When appellee in its brief states that the policies were issued, when it states that it informed appellants that the policies were issued, it refers to these undisputed facts, and entirely and completely avoids the questions of whether the policies were only offered in conjunction with the retrospective agreement, to be effective only on execution of that agreement, and whether they ever became effective by acceptance and compliance with the condition upon which they were offered. With the vital issue in this case, said appellee maintains that it is not concerned. We must avoid being confused by subtle and misleading use of terms.

GENERAL STATEMENT.

While we earnestly contend that such is not the fact, for the purpose of considering the third party issues it must be assumed that policies containing a guaran-

teed premium of 2.20 per cent of gross receipts were issued by Fidelity and were accepted by some act or omission of third party plaintiffs or defendant. Under the evidence adduced at the trial of this action, the conclusion is inescapable that if a liability on such policies exists it could only have arisen by wrongful and unauthorized action of third party defendant.

The position of third party defendant is an anomalous one. At no time did it ever consider or believe that the policies herein sued upon (policies bearing a flat, guaranteed premium of 2.20) were ever issued, offered or open to acceptance. Nevertheless, it disclaims any liability for the unauthorized acceptance of these policies and bases its disclaimer on the ground that it fully performed its duty by advising third party plaintiffs of the receipt of policies issued in conjunction with a retrospective premium plan. No attempt is made by third party defendant to explain how, or in what manner advice of the receipt of such policies could in any way be construed to release it from liability for the acceptance of the policies in dispute, policies bearing a guaranteed rate of premium.

The implication is, and appellee's argument is based upon the assumption, that when Bayly, Martin and Fay told Coughlin of the receipt of policies, it told him of the receipt of policies which bore a guaranteed rate of premium and which were effective without signing the retrospective agreement, instead of the receipt of policies of which the retrospective agreement was an integral part. Such implication and assumption are erroneous.

It is manifest that third party defendant, at all times, considered and understood that the policies it had received were issued in conjunction with, and as an integral part of a retrospective premium plan. The testimony of third party defendant conclusively establishes this fact. The following excerpts from its testimony are worthy of note in this regard:

“A. Yes. They set up those rates, but they were issued in conjunction with another agreement.

Q. I would like you to take policy No. 20968, which is the primary policy, plaintiff's Exhibit 3, and point out to the court where in that policy there is any reference made to the retrospective agreement.

A. It would not be necessary to be referred to in here because the policies were definitely issued with the understanding that the retrospective agreement would be entered into.” (Tr. 295.)

* * * * *

“Q. Why did Bayly, Martin & Fay not deliver Policies 20950 and 20968 to California Motors prior to October 22, 1947?

A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion, the transaction wasn't completed.” (Tr. 273.)

* * * * *

“Q. Did you tell him that, in your opinion, the company wasn't justified in claiming additional premiums?

A. I told him that I did not believe that they were entitled to the 2.20 rate on the earned

premium developed, or, in the gross receipts reported.

Q. What was your full conversation with him pertaining to that?

A. I contended that the rate was excessive; in other words, they were charging this earned premium on a guaranteed basis, and that I would not—the assured never agreed to pay 2.20 on a guaranteed basis, and I felt that the rate was excessive on the guaranteed basis * * *” (Tr. 276.)

* * * * *

“Q. Did you tell him anything in addition to that?

A. Well, I made the same contention as I made to Mr. Mettalia, and I did not agree or ever felt that they were entitled to charge on a guaranteed basis rate, the rate that was proposed on the retrospective basis.” (Tr. 277.)

* * * * *

“Q. What was said?

A. I objected to the rate charged in this final audit, and contended that the rate of 2 per cent for the primary should not apply at the earned premium because the rate of 2 per cent was only—was to be used in connection with the retrospective agreement, or retrospective agreement basis, and I felt that they were not charging a correct premium in applying the 2.20 rate for the over-all coverage.” (Tr. 336.)

* * * * *

“A. I had a further meeting with Mr. Mettalia and we were—we went over into Mr. Anderson’s office to review the whole situation again, and I made the same contention, that I did not feel that the insurance company was entitled to

use the 2.20 rate basis because that basis was to be used in connection with the retrospective agreement, and that my assured had never agreed to a 2.20 rate on a guaranteed basis, and that in view of the retrospective agreement not having been signed and entered into, that I could not agree with them that they were entitled to a 2.20, which would have been the standard rate under the retrospective plan.” (Tr. 336-337.)

* * * * *

“A. Yes. I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up because the transaction had not been completed as far as we are concerned; *there was no agreement*; the assured had not signed or agreed to the retrospective basis on which the company was insisting, and so I felt that it was still an unsettled problem, and, to my best recollection, I told her just to hold that temporarily.

Q. Were you asked on direct examination, when someone else called you as a witness, as to why you didn’t deliver the policy to Mr. Coughlin when you received it in October, 1946?

A. I didn’t deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective agreement, and until and unless the retrospective agreement was signed I didn’t wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned.” (Tr. 338-339.)

We also call attention to the following statements made in said appellee’s brief:

“On or about September 23, Cantlen was called to the Fidelity and Casualty Company office and delivered an *ultimatum* that the policies would have to *issue on a retrospective plan basis*. (Tr. p. 326); shortly thereafter Cantlen received the policies SPL 20968, and the proposed retrospective agreement, Defendants’ Exhibit C; upon receipt of the policies Cantlen read them and knew that the rate was therein set up as a standard rate of \$2.00 per \$100 of gross earnings.

Immediately after receiving the policies and the retrospective agreement from the plaintiff Cantlen went to see Coughlin taking with him the proposed retrospective agreement but not taking the policies because Bayly, Martin & Fay did not consider the issuance of the policies a completed transaction because of the insistence of plaintiff that the retrospective agreement be signed; the policies were finally physically delivered to the defendant on or about October 27, 1947, at which time Cantlen was still arguing with plaintiff that they should not charge the the \$2.00 standard rate.” (Bayly, Martin & Fay Brief, p. 6.)

Again (page 15):

“The very plausible reason that the policies were held by third party defendant was, as stated by Mr. Cantlen:

‘A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed, so, therefore, in our opinion the transaction wasn’t completed.’ (Tr. p. 273.)”

Bayly, Martin & Fay never had any idea that the rate set forth in policies 20968 and 20950 would be charged until the demand made by plaintiff on April 19, 1947.

“Defendants make a further point of the fact that third party defendant did not immediately notify defendants of a premium demand which third party defendant received on April 19, 1947. What defendants overlook is that this was the first notice to third party defendant that plaintiff was definitely claiming payment at the \$2.20 rate. (Tr. p. 275.) Following receipt of this demand Mr. Cantlen for third party defendant engaged in discussions with plaintiff as to the validity of this claim, disputed the right of plaintiff to collect the same (Tr. pp. 276-277), and finally assisted in the drafting of a letter to plaintiff over the signature of defendants, which letter is plaintiff's exhibit 18, declining payment of the invoices. (Tr. pp. 278-279.)” (A. B. pp. 18-19.)

If Bayly, Martin & Fay had considered these policies in effect, notwithstanding failure of execution of the retrospective agreement, it would have known that the rate therein provided would be applicable and without waiting until April 19, 1947 to receive a demand from plaintiff. If it had considered the policies effective, there would have been no basis for it to dispute the validity of the charge, or to instruct defendants to deny liability. As Bayly, Martin & Fay did not expect the plaintiff to charge the rate provided for in these policies and disputed the right to charge the same, Bayly, Martin & Fay must have con-

sidered that the rate in effect was that in the former policy No. 1457. That was the rate that had been paid and no other rate had been discussed. That rate could only have been considered effective under the binder or an oral extension of the former policy.

If third party defendant never knew, believed or considered that the policies it had received were issued and open to acceptance on a guaranteed premium basis, how may it now maintain that it advised third party plaintiffs of the receipt of such policies? It cannot. If we accept the premise that the evidence is sufficient to establish that third party defendant advised third party plaintiffs of the receipt of some policies, it necessarily follows that it could have advised third party plaintiffs only of the receipt of policies conditioned upon the execution of a retrospective agreement and not the policies upon which suit was brought.

Third party defendant never delivered or even showed the policies to third party plaintiffs. It retained them in its possession and control until long after liability thereon had been incurred. Third party plaintiffs were in no position to know the contents of the policies. If the Trial Court was correct in determining that the policies sued on were offered on a guaranteed basis, that the retrospective agreement was not an integral part of them, and that by retention of the policies acceptance followed, it necessarily was the mistake or negligence of third party defendant alone which gave rise to the acceptance of the

policies. It knew, or should have known, the nature of the policies offered. It alone, between the third party litigants, had possession of the policies and the opportunity to review them. If it failed to realize that these were guaranteed premium policies and by its retention of them caused acceptance to be implied, it is responsible to third party plaintiffs for the damage suffered.

**ACCEPTANCE OF THE POLICIES COULD ONLY HAVE BEEN BY
THE UNAUTHORIZED ACT OR OMISSION OF THIRD PARTY
DEFENDANT.**

While third party defendant had acted as broker for third party plaintiffs for some years, it had no authority to accept policies of insurance for its clients without the clients' express approval. (Tr. pp. 306-308.)

Third party plaintiffs at no time gave their approval to the policies here in question. The testimony of third party defendant conclusively establishes this.

“Q. Did Mr. Coughlin tell you he would accept or approve the policy of the combined rate of \$2.20, as compared with the rate of 1.223, which he had been paying?

A. No, he did not.

Q. Did you ever tell Mr. Mettalia or Mr. O'Malley that California Transport Company would accept policies with a \$2.20 rate?

A. No, I did not.” (Tr. 272-273.)

* * * * *

“Q. I call your attention to this statement; ‘at no time did we agree to a rate of 2.20 as

against our former rate of 1.223.' Did you draft that statement?

A. Yes." (Tr. 279.)

Throughout his entire testimony Cantlen reiterated that the assured had never agreed to pay 2.20 on a guaranteed basis and that he, himself, believed the rate was excessive and was not a proper rate. There was no express acceptance of the policies by either third party plaintiffs or defendant. Acceptance, if any existed, could only have been implied from the facts and circumstances.

Acceptance certainly could not be implied from any act performed by third party plaintiffs. Third party plaintiffs had entrusted the negotiations for insurance to third party defendant. They took no part in these negotiations, save and except, to express disapproval of the proposals made. They had no knowledge of any proposal on a guaranteed premium basis. They would not have agreed to pay a 2.20 rate of premium, and third party defendant knew it. Third party plaintiffs had never seen the policies, which were delivered to their broker. When they paid premiums, they were not the premiums called for by the policies sued upon, but were premiums called for by the prior policy held by them. Nothing was done by third party plaintiffs which could be construed as a basis for claiming acceptance of policies bearing a guaranteed rate of premium of 2.20.

The Court's finding that the third party defendant received and accepted the policies sued on with the

knowledge of and in accordance with instructions of third party plaintiffs finds no support in the evidence. (Tr. 60-61.)

Acceptance could have arisen only by the negligence or mistake of third party defendant. It was, and is, an experienced brokerage firm. It knows its duties in regard to the handling of insurance matters. It knew, or should have known, that by retaining policies in its possession a possible liability on behalf of its principals might arise. It knew, or should have known, that the policies it had received and retained, carried a guaranteed premium rate of 2.20. It knew it lacked authority to accept such policies. If any liability exists, it exists because third party defendant retained the policies and failed to notify the insurer that such policies were unacceptable. Had it delivered these policies to third party plaintiffs promptly upon receipt, they would as promptly have been rejected.

Under the provisions of section 383.5 of the Insurance Code of California, as set forth at length on page 58 of appellant's opening brief, a broker who fails to deliver policies to an insured is made liable for all damages sustained thereby. The purpose of this section is set forth in the law itself, to wit:

“The purpose of this section is to prevent fraud, *or mistake*, in connection with the transaction of insurance covering motor vehicles * * *

No clearer example of the reason for the statute could be made out than has been established by the facts in the instant action.

REPLY TO THIRD PARTY DEFENDANT'S BRIEF.

It is difficult to answer the brief submitted by third party defendant because it argues a matter not in litigation. All of the arguments contained in this brief deal with policies bearing a retrospective rating premium plan. None of the arguments applies to the policies here in question. The brief is utterly devoid of any reference or argument based upon the guaranteed premium for which recovery is sought. In its statement of the case third party defendant refers to policies "in question" as though the policies were retrospective rating policies. In its statement of facts third party defendant refers repeatedly to a retrospective rating plan, but makes not one statement concerning the guaranteed rate, herein sought to be recovered. Third party defendant does not claim it informed third party plaintiffs that if they failed to sign the retrospective agreement the basic rate in that agreement would become a guaranteed rate for which third party plaintiff would be bound. It does not even claim it knew such was the case. There is not one statement in the entire brief that third party defendant ever informed third party plaintiffs it had accepted any policies of insurance, even under the mistaken belief that they were retrospective policies. Giving an insured information concerning the receipt of proffered policies is a far cry from advising an insured that one is holding policies which it has accepted or which would be considered accepted if not returned. Advising one of the receipt of policies is far

removed from compliance with the mandatory duty of delivery of policies. Third party defendant may not casually brush aside this admitted breach of duty by the disarming statement that it notified third party plaintiffs of the issuance of policies. (Tr. p. 11.)

In reading the brief of third party defendant we cannot too urgently impress upon the Court the necessity of considering that whenever the word "policies" is used by third party defendant it is used in connection with policies issued in conjunction with and as an integral part of a retrospective rating plan, and that whenever the words "premium rating" or "rate" are referred to in the brief these words refer to a premium rate or a rate determined in accordance with such a retrospective plan. If the Court bears these facts in mind, it will readily see that there is not one shred of evidence in the record, nor one argument advanced, to support the position of third party defendant or the findings made in its favor.

The breaches of duty by third party defendant, which were the cause of liability, remain undisputed. These breaches were pointed out in third party plaintiffs' opening brief. They have not been countered and, in effect, all have been admitted. It is submitted that the following breaches of duty clearly establish this liability of third party defendant.

1. Third party defendant lacked authority to accept policies bearing a guaranteed rate of premium of 2.20 and realized it lacked such authority.

2. Third party defendant lacked authority to accept the retrospective plan offered and realized it lacked such authority.

3. Third party defendant retained the policies in its possession and failed to deliver them to its principals in accordance with law.

4. When the demand for additional premiums was made, third party defendant concealed the fact of such demand from its principals for approximately six months.

In addition to these flagrant breaches of duty the entire conduct of third party defendant was inconsistent with the obligation it owed its principals. A chronological review of the events which took place during the period sets forth in bold relief that it was the acts and omissions of third party defendant, and third party defendant alone, from which liability, if any exists, must stem.

At the time the question of renewal first arose Fidelity insisted upon a retrospective plan of insurance and third party plaintiffs refused to accept such a plan. Negotiations were then begun. The binder was obtained by third party defendant for the express purpose of keeping its principals covered during these negotiations. It was issued by Fidelity because it still hoped to secure third party plaintiffs' insurance business for the ensuing year. This binder was delivered to third party plaintiffs by third party defendant with a covering letter stating that the binder

would be third party plaintiffs' coverage pending renewal.

During the period covered by the binder third party defendant received certain policies of insurance together with a retrospective plan. Accepting as true that it advised third party plaintiffs of the receipt of such policies, it did not deliver them to third party plaintiffs but only delivered to them the retrospective plan with the request that they reconsider the same. At that time, when third party defendant knew the policies and plan were still unacceptable to its principals, it became the duty of third party defendant (assuming that there was any severance of the policies from the retrospective agreement and that retention of the policies could be construed as an acceptance) to either return the policies to Fidelity or to advise Fidelity that the policies had not yet been accepted but were under consideration. The binder was still in effect and the interests of its principal would have been protected. This it failed to do.

When the 60 day period of the binder expired and third party defendant was still unable to arrange for satisfactory coverage, it was its duty, if it believed further negotiations might prove fruitful, to secure an extension of the binder until such time as it could be determined whether policies of insurance acceptable to its principals could be obtained from Fidelity. Failing this, it was its duty to advise its principals of the termination of the binder and of the requirement that they either accept the policies offered or

place their insurance elsewhere. Neither of these things did third party defendant do.

Third party defendant seeks to place the blame for its failure on the shoulders of its principals. It seeks to do this by the extraordinary contention, iterated and reiterated throughout its brief (T.P.D. pp. 5, 14, 15, 16, 22), that its principals should have realized that the binder had expired, had not been renewed, and that if they were covered by insurance they could only have been covered by virtue of policies which they had never seen and which they had expressly rejected; that they had means of gleaning this information from a copy of a letter written by third party defendant in answer to a routine inquiry.

As third party plaintiffs pointed out in their opening brief (T.P.P. pp. 62-64), we are not here concerned with parties dealing at arm's length. We are concerned with principal and agent, a confidential relationship, which places the burden of complete disclosure upon the agent. This burden is not met by showing that the principals might have secured the information had they pursued an independent investigation. It is met only by an honest and complete disclosure by the agent. Third party defendant has failed utterly to discuss or mention this vital point. It does not question its soundness or applicability. The authorities cited are unanswered. Its significance cannot be avoided or its importance buried by silence or casual disregard. Respondent cannot avoid responsibility by reason of the letter to the American Manga-

nese or other notices or clues that, if pursued, could have led to discovery.

Third party plaintiffs had no reason to believe that the policies they had rejected were being retained by their broker without information having been transmitted to Fidelity that they were unacceptable. They had the right to presume, in the absence of notice from their agent, that the insurance company had been informed that the policies were unsatisfactory, and that an extension of coverage had been arranged in accordance with the original letter forwarding the binder. They could not presume that policies had been accepted in direct violation of their instructions. Knowing nothing whatsoever about policies bearing a guaranteed premium of 2.20, no act on their part could be construed as an acceptance of such policies.

In an attempt to justify its failure to deliver the policies as required by law, third party defendant contends that the policies were only delivered in conjunction with the retrospective agreement, that the retrospective agreement had to be signed and until signed the entire transaction was inchoate, and that consequently there were no policies in effect that it had the duty to deliver.

“The very plausible reason that the policies were held by third party defendant was, as stated by Mr. Cantlen:

‘A. The reason the policies were not delivered, Mr. Eisner, was because the policies were issued in conjunction with the retrospective agreement, and the retrospective agreement was never signed,

so, therefore, in our opinion, the transaction wasn't completed'. (Tr. p. 273.)"

(T.P.D. B. p. 15.)

Third party defendant might also have quoted the following additional testimony to the same effect given by Mr. Cantlen:

"I didn't deliver the policies to Mr. Coughlin because the policies were issued in conjunction with the retrospective agreement, and until and unless the retrospective agreement was signed I didn't wish to involve the contracts and put them through our books. It was still an unfinished matter, as far as our office was concerned." (Tr. p. 339.)

"Yes. I remember when the young lady brought the remittance in, called to my attention the remittance had been received, and I told her to hold it up because the transaction had not been completed, as far as we were concerned; there was no agreement; the assured had not consented or agreed to the retrospective basis on which the company was insisting, and so I felt that it was still an unsettled problem, and to my best recollection, I told her just to hold that temporarily." (Tr. pp. 338-339.)

This argument in justification of failure to deliver the policies places the indelible stamp of inconsistency and falsity upon the argument that third party defendant informed third party plaintiffs of the receipt of policies bearing a guaranteed rate of premium or that third party plaintiffs should have known that

such policies were in effect. In one breath, third party defendant argues that there were no effective policies and that it therefore violated no duty by failure to deliver the pieces of paper that it had received; and in the next breath argues that it placed third party plaintiffs on notice by informing them that there were effective policies and that it was holding them. As third party defendant admittedly did not believe that these policies were effective, the latter contention cannot be true.

If third party defendant was justified in failing to deliver the policies, for the reasons contended, then the plaintiff in this action is not entitled to recover. These policies were never effective. On the other hand, if these policies were effective, and plaintiff is entitled to recover, then there was a clear breach of duty on the part of third party defendant.

The lack of realization or belief on the part of third party defendant that these policies were effective is further demonstrated by the argument advanced in justification of failure to promptly notify third party plaintiffs of plaintiff's demand for additional premiums:

"What defendants overlook is that this is the first notice to third party defendant that plaintiff was definitely claiming payment at the \$2.20 rate. (Tr. p. 275.) Following receipt of this demand Mr. Cantlen for third party defendant engaged in discussions with plaintiff as to the validity of this claim, disputed the right of plaintiff to collect the same (Tr. pp. 276-277) and finally assisted in the

drafting of a letter to plaintiff over the signature of defendants, which letter is plaintiff's exhibit 18, declining payment of the invoices (Tr. pp. 278-279.)"

Third party defendant has no answer to the fact that it advised third party plaintiffs that pending negotiations for the renewal of insurance the binder would cover third party plaintiffs at the expiring policy rate of 1.223% of the gross receipts.

Third party defendant refers to a conflict of evidence upon this point. There is no such conflict. The only testimony given in respect to this matter was that of third party plaintiffs and it stands in the record unimpeached and uncontradicted. Third party defendant argues that the rate in the binder was left blank and that according to the provisions of the binder, the rate to be charged would be that of the renewal policy. According to third party defendant's written notification, the binder would remain in effect pending negotiations for renewal. The rate prevailing under the binder could only have been that of the former policy. Let us assume that there was no renewal insurance that supplanted the binder, and that the temporary coverage afforded by the binder had been cancelled either at the request of Fidelity or third party plaintiffs. What then would the premium rate under the binder have been? What could it have been but the old rate, which was paid and accepted during the period of negotiations? So long as third party plaintiffs did not accept any proffered policies, they had the right to

believe, as they did believe, that the old rate would remain in effect until an agreement was reached or the binder terminated.

THIRD PARTY PLAINTIFFS PROVED THEIR DAMAGE.

Third party defendant makes the claim that third party plaintiffs suffered no damage by its acts and that there is no proof that third plaintiffs could have placed the risk elsewhere at the former rate of \$1.223. (T.P.D. B. p. 20.)

This claim of third party plaintiffs is devoid of merit. An agent cannot, with impunity, incur liability for its principals in violation of its express limitation of authority.

“If an agent to purchase pays more than his principal authorizes him to pay, he is liable to the principal for any excess of the principal’s funds so expended.”

Western Union Telegraph Co. v. Chichuaua Exchange, 206 S. W. 364;
3 C.J.S. 34.

Prima facie, the amount for which the agent has rendered the principal liable, over and above the amount authorized, is the amount of damage. The burden is on the agent to reduce the damages.

Sedgwick on Damages (Ninth Edition) Vol. 3
Sec. 814.

Coughlin testified (Tr. pp. 417-418) that at the time of expiration of the old policy he could have placed the

risk elsewhere at the same rate. This evidence remains uncontradicted and undisputed. As soon as negotiations with Fidelity were terminated, appellants placed the insurance with the Transport Insurance Exchange. The rate was slightly higher than the rate at which the insurance could have been placed in September, 1946. There is not the slightest question, but that if appellants had been advised that they were, or were about to be, covered at a \$2.20 rate of premium, they could and would have immediately placed the insurance with the Transport Insurance Exchange.

Even taking the rate at which the insurance was ultimately placed in December, 1946, and the loss experience of the appellants from September 1, 1946, to January 2, 1947, the premium would have been substantially less than that demanded by Fidelity. This is not the measure of damage, as at the time it became the duty of Bayly, Martin & Fay to disclose to appellants that further coverage by Fidelity would be at the rate of \$2.20, the insurance could have been placed at the former rate. As stated, however, taking the loss experience from September 1, 1946, to January 21, 1947, and applying thereto the terms of the policy of Transport Insurance Exchange issued in December, 1946, the premium or cost of the insurance to appellants would have been substantially less than the amount of premium calculated at the \$2.20 rate.

Under the primary policy accepted by appellants the earned premium was to be determined by the following formula:

1. Incurred losses and loss expenses, plus
2. Thirteen per cent (13%) of the premium paid for Home Office Overhead Expenses and contribution policyholders' surplus, plus
3. Taxes paid by the exchange, plus
4. The deficit if any, from previous accounting period or periods.
5. Commissions paid.

Since this would have been the original policy of appellants with the exchange and since it would have placed the same directly the last two factors would not apply to the determination of the premium in this instance. The known loss and loss expense for the period was \$7800.00 (Tr. pp. 125-126.) Applying the 13% overhead and surplus factor the earned premium under the primary policy would have been \$8814.00. To this would have to be added the tax assessed by the State of California against the gross premium. During the period in question this tax assessed at the rate of 2.4%. (Revenue Laws of California, Sec. 12256.) The total premium on the primary policy would therefore have been \$9025.53. Fidelity is claiming a total primary premium of \$15,081.64, for the same coverage and period. (Tr. p. 6.)

The excess coverage placed with the exchange was at the flat rate of \$.30 per one hundred dollars of gross receipts. The total gross receipts of third party plaintiffs during this period were \$746,615.81. (Exhibit 12.) The premium on this portion of the coverage would

have been \$2314.51, making a combined total premium of \$11,340.04 as against a combined total premium of \$16,972.12 claimed by Fidelity.

The damage to third party plaintiffs is clear.

CONCLUSION.

The brief against third party defendant has, of course, been written on the assumption that Policies 20968 and 20950, guaranteed premium policies, were offered and accepted, and became legally effective as of September 1, 1946. This, we earnestly contend, was not the fact. If the policies were accepted, again assuming that they were offered for acceptance, then the negligence and breaches of duty of the agent to its principal were indeed flagrant. If a liability exists from appellants to the plaintiff, then there exists a corresponding liability of third party defendant to appellants.

It is respectfully submitted that the judgment in favor of the appellee-plaintiff should be reversed. On the other hand, if it be held that plaintiff is entitled to judgment, then the judgment in favor of third party defendant should be reversed.

Dated, San Francisco, California,
March 30, 1951.

Respectfully submitted,

NORMAN A. EISNER,

Attorney for Appellants.



No. 12,722

IN THE

United States Court of Appeals
For the Ninth Circuit

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
(a corporation), et al.,

Appellants,

vs.

THE FIDELITY AND CASUALTY COMPANY
OF NEW YORK (a corporation), and
BAYLY, MARTIN & FAY, INC. OF CALI-
FORNIA (a corporation),

Appellees.

Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANTS' PETITION FOR A REHEARING.

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*Attorney for Appellants
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FILED

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UL P. O'BRIEN
CLERK

No. 12,722

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**United States Court of Appeals
For the Ninth Circuit**

CALIFORNIA MOTOR TRANSPORT CO., LTD.,
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Upon Appeal from the United States District Court for the
Northern District of California, Southern Division.

APPELLANTS' PETITION FOR A REHEARING.

*To the Honorable William Denman, Chief Judge, and
to the Honorable Associate Judges of the United
States Court of Appeals for the Ninth Circuit:*

Appellants respectfully petition for a rehearing
upon the following grounds:

We believe that the opinion of this Honorable Court
is based upon a misconception of fact. The crux of
the case is that the policies sued upon never became

effective. They were never open for acceptance except on condition that the retrospective agreement would be executed and constitute a part of the contract. After reciting that the retrospective agreement and the policies were delivered to Bayly at the same time, the opinion states:

“Fidelity did not then or at any time state that the new policies were not to be effective unless and until appellants executed the proposed agreement. Neither of the new policies contained any such statement or provision. The proposed agreement was not mentioned in either of the new policies. Appellants’ failure to execute the proposed agreement cannot, therefore, be regarded as a rejection or refusal to accept the new policies.”

The retrospective agreement *was* mentioned in the policies of insurance. Policy SPL 20950 contains an express reference to the retrospective plan in endorsement 8. The retrospective agreement, drawn by the same company and delivered at the same time, shows upon its face that it was to be a part and parcel of the policies. It recites that the primary policy SPL 20968 was to be issued, not independently, but “upon the security of this agreement”. Mr. Mettalia testified that on delivering the policies and agreement, he told Mr. Cantlen “we wanted that signed so that this would be part of the renewal policy.” The policies, without the agreement, are on a guaranteed rate basis and the evidence is undisputed that Fidelity would not consider issuing policies on a guaranteed basis. The testimony of Mr. Mettalia of Fidelity is conclusive in

this regard. From the time of the original negotiations in August, the discussions always concerned a rate that would be adjusted in accordance with the loss experience of the insured. (Mettalia, Tr. p. 130.) Fidelity would not even consider a primary rate of \$2.00. (Mettalia, Tr. p. 128.) The company considered the execution of the agreement as an integral part of the declaration of the policies. (Tr. p. 244.)

Despite these uncontradicted facts, the Court rejects the contention that the new policies did not become effective, for the reason and upon the theory that if the policies were not effective (as the 60 day period referred to in the binder had expired), appellants, after October 31, 1946, would have been without coverage. This we respectfully submit, is not a proper conclusion.

Let us assume that these policies had not been written or delivered, but that everything else had transpired just as it did transpire. The 60 days had expired and there had been no express extension of the binder. However, premiums continued to be paid and accepted at the rate of the former policy and exactly as during the 60 day period. What then would be the conclusion? Would it be that the appellants were not covered by insurance after the 60 day period? This would necessarily follow if the conclusion of this Court is correct, that unless covered by the new policies appellants would have had no coverage after the expiration of the 60 days.

Clearly, such a conclusion would be entirely wrong. Inevitably, the conclusion would be that the status and arrangement existing during the 60 days, had been expressly or impliedly continued by mutual consent. The conduct of insurer and insured continued identically as during the 60 days. In the case of *Conner v. Garrett*, 65 C.A. 661, it is stated:

“The agreement created a relation between the parties for a given time, out of which there arose reciprocal rights. When the parties, after the expiration of the time so limited, continued the relation by mutual consent, whether express or implied, it is to be inferred, in the absence of evidence to the contrary, that the respective rights growing out of the relation remained unchanged.”

If the new policies had never been written, so long as Fidelity continued to accept premiums, it could never have successfully claimed that appellants were not covered. It would not be heard to say that its liability terminated at the expiration of 60 days.

It is apparent that this Honorable Court has arrived at the decision in the case upon the assumption that insurance could only have existed by virtue of the policies, and as insurance did exist, then these policies must have been in effect. The major premise is not true. Insurance would have existed without these policies.

The Court has not considered what would be the decision if the position of the parties had been reversed. Let us assume that the appellants were endeavoring to assert a claim under the new policies,

which did not exist under the former policy. Let us assume that the Fidelity raised the defense that the policies had never been accepted because the retrospective agreement had not been signed and the policies were only offered for acceptance in conjunction with the agreement. Let us assume that appellants contended that they were insured and therefore these policies must have been in effect. Under the undisputed facts in the case, no Court would have given such a contention on the part of appellants serious consideration. The answer, without the slightest doubt, would have been that appellants were covered for 60 days by binder and either expressly or impliedly that same coverage was continued by mutual consent.

According to the opinion, the binder expired on October 31, 1946, and the insurance coverage thereafter could only have been by virtue of these policies. If this were the case and it were as obvious as that, how can the Court account for the fact that Bayly did not consider the policies in effect? Bayly did not hold the policies for appellants. Bayly did not deliver the policies, because it considered that they would only become effective when and if the retrospective agreement was signed. Bayly did not seek to persuade Fidelity to reduce its bill for these premiums. It contended that there was no right on the part of Fidelity to charge premiums under these policies.

The opinion states that appellants and Fidelity treated the new policies as being effective. Certainly, there is no evidence whatsoever to indicate or support

an inference that appellants treated the policies as in effect. As for Fidelity, its conduct was the very opposite of what it would have been if it had treated these policies as in effect. It is inconceivable that Fidelity would have accepted or that Bayly would have processed returns and premiums at the rate of the former policy, if these policies had been considered effective.

The Court dismisses the appeal with respect to the liability of Bayly, Martin and Fay with the simple reference to Rule 52(a) of the Federal Rules of Civil Procedure. This rule has no applicabilty here, where the facts upon which the liability of Bayly is predicated are undisputed and uncontradicted. We respectfully suggest that the Court review that portion of Appellants' Brief devoted to the liability of Bayly. It is unmistakably clear that acceptance, if any may be deemed to have existed, could only have arisen through the act of Bayly. It is equally clear that Bayly never knew or believed the policies sued upon were open to or offered for acceptance. How may it then be said that if the policies were accepted by an act of Bayly, it is not responsible therefor?

This Court does not mention the fact that Bayly admittedly violated a positive duty imposed by law in retaining possession of the policies, if they were in effect.

Unfortunately, some facts have not been clearly presented to this Honorable Court. We sincerely believe that a miscarriage of justice will result if this

decision is permitted to stand. Appellants pray that a rehearing be granted so that the matter may be given further consideration.

Dated, San Francisco, California,
November 26, 1951.

Respectfully submitted,
NORMAN A. EISNER,
*Attorney for Appellants
and Petitioners.*

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
November 26, 1951.

NORMAN A. EISNER,
*Counsel for Appellants
and Petitioners.*

No. 12,723

SERVED BY MAIL

IN THE

FEB 27 1951

United States
Court of Appeals

AFFIDAVIT OF SERVICE
ATTACHED TO ORIGINAL

For the Ninth Circuit

UNITED STATES ex rel. S. Roberts, S.
ROBERTS,

Appellants,

vs.

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Appellee,

JOHN DOE Nos. 1 to 40

JANE DOES Nos. 1 to 10,

Defendants.

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FILED

FEB 27 1951

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IN THE

United States
Court of Appeals

For the Ninth Circuit

UNITED STATES ex rel. S. Roberts, S.
ROBERTS,

Appellants,

VS.

THE WESTERN PACIFIC RAILROAD COM-
PANY,

Appellee,

JOHN DOE Nos. 1 to 40

JANE DOES Nos. 1 to 10,

Defendants.

Brief for Appellee

**STATEMENT OF JURISDICTION, PLEADINGS
AND PROCEEDINGS BELOW**

This is a *qui tam* action brought in the District Court of the United States for the Northern District of California under 31 U.S.C.A. §§231-233, 235¹ by the appellant, on be-

¹The complaint alleges that the action is brought under 31 U.S.C.A. §§231-235. §234, however, was repealed on December 23, 1943, c. 377, §2, 57 Stat. 609. The text of these sections, both before and after the amendments of December 23, 1943, appears in the appendix.

half of himself and the United States, to recover penalties and double damages allegedly sustained by the United States as a result of the filing of "fraudulent"² income tax and excess profits tax returns by the Western Pacific Railroad **Corporation**, former owner of all the capital stock of the Western Pacific Railroad **Company**, appellee herein, with the Bureau of Internal Revenue.

The complaint was filed on February 24, 1950³ (R 2). Thereafter appellee moved to dismiss the action on three grounds: (1) that the action was one for the recovery of taxes and penalties, and it did not appear from the complaint that the action had been authorized or sanctioned by the Commissioner of Internal Revenue, or that the Attorney General had directed that it be commenced, as required by 26 U.S.C.A. § 3740;⁴ (2) that the complaint, as amended, failed to allege any facts from which it could be held that appellee had done or failed to do anything which would render it liable for any of the penalties, payments, forfeitures, or damages provided for in 31 U.S.C.A. § 231; (3) that the suit was based upon evidence and information in the possession of the United States, and of agencies, officers and employees thereof, at the time that the suit was brought, so as to deprive the District Court of jurisdiction over the action under the provisions of 31 U.S.C.A. § 232(C), and that all matters of fact alleged in

²Although the complaint alleges that the income tax returns were "fraudulent," such allegations are mere conclusions of law, not supported by allegations of fact in the remainder of the complaint. See pp. 11, 33-36, *infra*.

³On April 28, 1950, the United States filed a statement of non-appearance (R 65), and on June 28, 1950, appellant filed in open court a "supplement to complaint" (R 62).

⁴See p. 31, *infra*.

the complaint as amended were matters of public record (R 66-68). The District Court granted the motion to dismiss on the last mentioned ground. In its order of dismissal, the District Court expressed the opinion that the complaint alleges sufficient facts from which it can be held that the appellee had incurred liability under 31 U.S.C.A. § 231. The court found it unnecessary to rule upon the question of whether or not the suit must have been authorized or sanctioned by the Commissioner of Internal Revenue or the Attorney General under the provisions of 26 U.S.C.A. § 3740 (R 87-88).

On October 18, 1950, the District Court entered a judgment of dismissal and on October 23, 1950, appellant filed a notice of appeal to this Court (R 90). Jurisdiction of the District Court to entertain and dismiss this action is conferred by 31 U.S.C.A. § 232. Jurisdiction of this Court over the appeal is conferred by 28 U.S.C.A. §§ 1291, 1294.

STATEMENT OF FACTS

Incorporated into the complaint and made a part thereof by reference is the opinion of Judge Goodman in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, 85 F. Supp. 868 (N.D. Calif. 1949) (R 21). The defendant in that case is also the appellee in the case at bar. A portion of Judge Goodman's opinion will serve to acquaint the Court with the background of the present proceeding:

“Plaintiff is The Western Pacific Railroad Corporation; its subsidiary was Western Pacific Railroad Company, an operating railroad Company, herein referred to as the ‘debtor’; defendant, the reorganized subsidiary, is The Western Pacific Railroad Company.

* * * * *

“Plaintiff corporation, a so-called holding company, from 1916 to April 30, 1944, owned all the outstanding capital stock of the debtor. For some years prior to 1935, the financial condition of the debtor had been steadily worsening. In 1935 it filed a petition under Section 77 of the Bankruptcy Act, 11 U.S.C.A. § 205, and this Court in that year placed its affairs in the hands of trustees. Thereafter a plan of reorganization was proposed and in 1939 it was approved by the Interstate Commerce Commission. 233 I.C.C. 409. Inter alia, it was determined in the plan that the capital stock of the debtor owned by the plaintiff was without equity or value and that plaintiff and its stockholders therefore were not entitled to participate in the plan. In 1940 this Court approved the plan of reorganization, including approval of the findings of the Interstate Commerce Commission as to the worthlessness of the plaintiff’s equity. The Circuit Court of Appeals (now Court of Appeals) of the Ninth Circuit reversed in 1941, 124 F.2d 136. In 1943 the Supreme Court reversed the Circuit Court and affirmed the order of the District Court. *Ecker v. Western Pac. R. R. Corp.*, 318 U.S. 448, 63 S.Ct. 692, 87 L.Ed. 892. It there considered and rejected the contention of the plaintiff that it should have the right to participate in the plan because of recent increased earnings of the debtor. 318 U.S. at pages 508, 509, 63 S. Ct. at pages 723, 724.¹ Thereafter, the plan of reorganization was, in accordance with the statutory provisions, 11 U.S.C.A. § 205 (e), submitted to the creditors, and, after their approval, the plan was confirmed on October 11, 1943, by this Court. The reorganization committee des-

[Court’s Footnote 1]. See *In re Denver & R. G. W. R. Co.*, 10 Cir., 150 F.2d 28 and *Reconstruction Finance Corp. v. Denver & R. G. R. Co.*, 328 U.S. 495, 66 S.Ct. 1282, 90 L.Ed. 1400, where similar holdings upon similar contentions were made.

ignated in the plan of reorganization, instead of forming a new corporation, determined to use the corporate structure or shell of the old company (debtor) and to execute the plan of reorganization by revesting its former properties in the reorganized company, i.e. the defendant. On November 22, 1943, an agreement was made between the plaintiff, its secured creditors and the reorganization committee wherein a modus of revesting was set up. Among other things, the plaintiff agreed therein to transfer all of its stock in the debtor to the reorganization committee. This agreement was approved by this Court, in December 1943. **The transfer of the stock was not actually made until April 1944** because of an unsuccessful litigative² attempt to prevent the same. **During the period of years in which the plaintiff was the owner of all the outstanding stock of the debtor, plaintiff had followed the practice of filing consolidated or affiliated income tax returns**, in which it had reported the earnings of the debtor as well as other affiliated companies, which the plaintiff wholly or partly owned. The amount of taxes paid by the plaintiff pursuant to such returns was allocated among the various subsidiary companies having taxable income in proportion to the amount of such taxable income. **The practice of filing the consolidated returns continued throughout the reorganization period.** The returns, during the reorganization period, were prepared by the employees of the debtor and signed by the president of the plaintiff corporation, although they were never submitted to its board of directors for approval or consideration.

“During the year 1942, the debtor made substantial net earnings. Neither plaintiff, nor any of its other subsidiary companies, had any earnings during 1942.

[Court's Footnote 2]. *Bryan v. Western Pac. R. Corp.*, Del. Ch. 1944, 35 A.2d 909.

A consolidated return was filed for the year 1942 in which the tax liability, due to the earnings of the debtor, was \$4,144,828. Later in 1943, after the filing of the 1942 return and payment of the tax, the tax attorneys for defendant 'discovered' Section 123 of the Revenue Act of 1942. 26 U.S.C.A. § 23(g)(4).³ They proposed what they denoted a 'paradoxical' theory, by which the worthlessness of the plaintiff's stock (which had cost the plaintiff some \$75,000,000) in the operating railroad company (debtor) might be availed of as an offset to the operating income of the debtor and thus result in a net loss and no tax obligation. Further, their theory was that part of this \$75,000,000, loss in 1943, could be 'carried back' to 1942, § 122(b)(1), 26 U.S.C.A. § 122(b)(1), and part could be 'carried over' to 1944. Section 122(b)(2) of the Internal Revenue Code, 26 U.S.C.A. § 122(b)(2). Thereupon a claim for refund of the amount of tax paid for 1942 was filed in the name of the plaintiff. Operations of the debtor during 1943 and up to April 30, 1944 were increasingly profitable and, except for the offset of the capital stock loss of the plaintiff itself, would have called for the payment of some \$17,000,000 in income taxes. So the tax attorneys caused the filing of consolidated tax returns for 1943 and for the forepart of 1944 in the name of plaintiff, in which sufficient portions of the \$75,000,000 stock loss were used as offsets against the operating accounts for these years, so as to show no net income. The validity of the offsets was questioned by the Commissioner of Internal Revenue and conferences were had between the tax counsel for the defend-

[Court's Footnote 3]. "Stock in affiliated corporation. For the purposes of paragraph (2) stock in a corporation affiliated with the taxpayer shall not be deemed a capital asset." Subsection 4 of §23(g). By this subsection, losses resulting from worthlessness of stock of an affiliate became operating losses instead of capital losses as theretofore.

ant and the Commissioner. As a result, a tax settlement was made with the Commissioner whereby, in consideration of the withdrawal of the claim for refund, the Commissioner accepted and approved the returns. * * *

“Subsequent to the filing of the claim for refund of the 1942 tax paid, and the filing of the consolidated tax returns for 1943 and part of 1944, and after negotiations for the settlement of the entire tax issue with the Commissioner of Internal Revenue had started, the plaintiff, on October 10, 1946 filed its bill of complaint in equity herein. In substance the bill of complaint recited the filing of the claim for refund, the commencement of the negotiations for the approval of the consolidated returns and prayed that the Court settle the proprietary rights of the plaintiff and the defendant in the tax saving involved. It was further prayed that funds equivalent to the tax savings be placed in the custody of the court for proper and equitable distribution.⁴

“On April 7, 1947, the Court permitted the filing of a complaint in intervention on behalf of certain stockholders of the plaintiff who wished to join in the demand of the plaintiff and in its prayer for relief against the defendant. The settlement and agreement with the Commissioner, by which the claim for refund was withdrawn and the consolidated returns for the years 1942, 1943 and part of 1944 were accepted and approved, was consummated on August 14, 1947.

“On December 17, 1947, plaintiff filed a supplementary bill of complaint, wherein the consummation of the settlement and compromise was set forth. It

[Court's Footnote 4]. The debtor had on two separate occasions set aside reserve funds for the payment of the taxes, to protect against the contingency of adverse ruling by Commissioner or Court.

was there further alleged that the defendant through its officers and attorneys had controlled the board of directors of the plaintiff corporation and that by reason of such control plaintiff was caused to file the consolidated returns for the benefit of the defendant. Throughout the proceedings and in the trial, this has been referred to as 'duality of control.'

"In the supplementary complaint, the plaintiff prayed that the Court, in equity, enter a decree allocating and directing the payment of the abated taxes, amounting to some \$17,000,000, to the plaintiff by way of mitigation of its losses in its subsidiary.

"After many preliminary motions were made and disposed of, and after the filing of answers by the defendants and after pre-trial conference, the cause finally came on for trial."

Judge Goodman's opinion went on to hold that, for given reasons, the plaintiff holding corporation was not entitled to the relief sought and that judgment should go for the defendant. An appeal from Judge Goodman's decision is pending in this court as No. 12,506.

In the present action the complaint is divided into three counts. All three counts allege the reorganization proceedings substantially as outlined in the above-quoted portion of Judge Goodman's opinion (R 6-15, 30, 43).⁵ The first

⁵The complaint alleges that the "Final Order" of the District Court in the reorganization proceedings dated March 29, 1946, had contained the following provision:

"6. All persons, firms, and corporations whatsoever, and wheresoever situated, located or domiciled, are hereby perpetually restrained and enjoined from instituting, prosecuting or pursuing, or attempting to institute, prosecute or pursue, any suit or suits or proceedings in law or in equity, or otherwise, against the Western Pacific Railroad Company, or against the successors or assigns of said Company, or against any of the assets or property of said Company or its

count then alleges that during the year 1943 appellee, together with certain other named subsidiaries, had sufficient taxable net income to make it liable for \$12,768,712.75 in income and excess profits taxes for that year⁶ (R 16). It then alleges that appellee caused a consolidated income and excess profits tax return for 1943 to be drawn up and filed "in the name of but without the knowledge of" The Western Pacific Railroad Corporation (referred to in the complaint and hereafter in this brief as the holding company), in which the holding company's stock loss was shown as offsetting all the taxable income of appellee and the subsidiaries. Despite its general allegation that the return was drawn up "without the knowledge of the Holding Company," the first count of the complaint alleges that the return was signed by the president of the holding company and assented to "by the holding company" while negotiations for the approval of the return by the Internal Revenue Bureau were still pending (R 24-27). It is also alleged that none of the tax savings which arose out of the inclusion of the holding company's stock loss in the return in-

successors or assigns, directly or indirectly, on account of or based upon any right, claims or interest of any kind or nature whatsoever which any such person, firm or corporation may have had in, to or against the Debtor, or any of its assets or properties, on or before December 28, 1944 (except as specifically provided for or permitted by prior order of this Court)
 * * * (R 4-5).

It is alleged that appellant sought permission of the court to bring this action, but that such permission was not granted (R 5, 62-63).

"The discrepancies between figures in the complaint with respect to the income and excess profits tax that would have been due for the years 1942, 1943 and 1944, if the stock loss had not been taken into account, and the figures given in Judge Goodman's opinion are probably due to the fact that Judge Goodman's figures are based on the income of appellee alone, while the figures in the complaint purport to be based on the income not only of appellee but also of certain of its subsidiaries.

ured to the benefit of the holding company itself (R 27-29).

The second count is similar to the first, except that it alleges that during the first four months of 1944, appellee and certain of its named subsidiaries had sufficient taxable net income to create an income and excess profits tax liability of \$1,957,800.37, and that a similar consolidated return was filed for that period in which all of the income was offset by the loss of the holding company (R 31, 37).

The third count alleges that during the year 1942, appellee and certain of its named subsidiaries had sufficient taxable net income to create a liability for income and excess profits taxes of \$6,980,944.45 but that appellee caused to be drawn up and filed a return which showed that only \$4,201,821.54 of such taxes was due (R 44-45). It is further alleged that on or about March 9, 1945, appellee submitted to the Internal Revenue Bureau a claim for refund of the said \$4,201,821.54 and that subsequently appellee, in the name of the holding company, offered to drop the refund claim if the Internal Revenue Bureau would accept the consolidated returns for 1942, 1943 and 1944 as filed. This proposal is alleged to have been assented to by the Internal Revenue Bureau (R 43-44, 46-47, 54-61).

The complaint is replete with allegations which are not well-pleaded facts but are mere conclusions of law: for example, that under the Internal Revenue laws appellee was under a duty to pay to the United States certain amounts in taxes (R 15-17, 30-33, 44-46);⁷ that the Internal Revenue laws lay down certain requirements for the privilege of

⁷*Stewart v. Ahern*, 32 F.2d 864 (9 Cir. 1929) (time at which indebtedness incurred held legal conclusion); *Scott v. Most Worshipful Grand Lodge of Free, Ancient & Accepted Masons*, 23 F.2d 991 (D.C. Cir. 1927) (averments that sums advanced by plaintiffs were due and owing held legal conclusions).

filing consolidated income and excess profits tax returns (R 21-22, 34-35);⁸ and that the holding company was not the parent corporation of or affiliated with appellee for tax purposes during the periods for which the alleged returns were filed (R 22-23, 26-27, 35, 39).⁹ Appellee, of course, did not admit these legal conclusions by making its motion to dismiss.¹⁰ Similarly, the many general characterizations of the tax returns, refund claim, and other communications filed with the Internal Revenue Bureau as "false," "fictitious," and "fraudulent" are mere conclusions not admitted by appellee in its motion to dismiss.¹¹ The only specific representations to the Internal Revenue Bureau which the complaint alleges and relies upon as constituting fraud are: "that the Tax Returns for the three tax periods were in fact, truth and reality made and submitted by the Holding Company," (R 48); "that the Holding Company was at the time in question still the Parent Corporation of the defendant by virtue of the ownership of at least 95% of

⁸*Nortz v. United States*, 294 U.S. 317, 79 L.ed. 907 (1935); *Lucking v. Delano*, 122 F.2d 21 (D.C. Cir. 1941); *Fletcher v. Jones*, 105 F.2d 58 (D.C. Cir. 1939).

⁹Cf. *United States ex rel. Meyer Salzman v. Salant & Salant, Inc.*, 41 F. Supp. 196 (S.D. N.Y. 1938) (qui tam action under 31 U.S.C.A. §§231-235).

¹⁰*Newport News Shipbuilding & Drydock Co. v. Schauffler*, 303 U.S. 54, 82 L.Ed. 649 (1938); *Zeligson v. Hartman-Blair, Inc.*, 126 F.2d 595 (10 Cir. 1942); *LeClair v. Swift*, 76 F. Supp. 729 (E.D. Wis. 1948); *Flanigan v. Security-First Nat. Bank*, 41 F. Supp. 77 (S.D. Calif. 1941).

¹¹*Cahill v. Curtiss-Wright Corp.*, 57 F. Supp. 614 (W.D. Ky. 1944) (qui tam action under 31 U.S.C.A. §§231-235); *Davis v. State Bank of Woodstock*, 151 F.2d 180 (7 cir. 1945); *McCampbell v. Warrich Corp.*, 109 F.2d 115 (7 Cir. 1940) (cert. den. 325 U.S. 867, 89 L.Ed. 1986; *Rishel v. Pacific Mut. Life Ins. Co. of California*, 78 F.2d 881 (10 Cir. 1935); *Zaring et al. v. Strauss & Co.*, 30 F.2d 313 (9 Cir. 1929); *Tennessee Gas Transmission Co. v. Boyles*, 74 F. Supp. 258 (W.D. La. 1947).

defendant's VALID capital stock"; "that the Holding Company at such time had and exercised sole, exclusive and absolute control over defendant"; and "that the \$17,505,636.03 tax saving accomplished by the settlement would go, inure and accrue to the Holding Company in mitigation of its \$75,000,000 stock loss in defendant's capital stock" (R 49). As demonstrated hereinafter,¹² the allegation of none of these specific representations is sufficient to constitute an allegation of fraud, because each of the representations was either true or immaterial or a mere legal conclusion.¹³

SUMMARY OF ARGUMENT

This Court may properly affirm the judgment on any of the grounds appearing in the record, whether or not relied upon by the court below. First, the judgment should be affirmed because the action was based upon evidence and information already in the hands of the District Court, as shown by the proceedings before Judge Goodman, and of the Bureau of Internal Revenue. Possession of such evidence and information on the part of either of these agencies of the United States was sufficient without more to deprive the District Court of jurisdiction under 31 U.S.C. § 232, re-

¹²See pp. 34-36, *infra*.

¹³The "supplement to complaint" alleges that prior to the filing of the original complaint appellant personally delivered a copy of the complaint to the office of the United States Attorney for the Northern District of California and sent by registered mail to the Attorney General of the United States a copy of the complaint and a disclosure of all evidence and information relating to this action then in appellant's possession, and that the Attorney General neither entered an appearance in the case nor gave any notice of non-appearance therein within 60 days of the filing of the complaint but did enter a notice of non-appearance after the expiration of such 60 days. Appellee concedes that these allegations sufficiently set forth a fulfillment of the requirement of the first three sentences of 31 U.S.C.A. § 232(C), appendix p. 3, *infra*.

gardless of whether the Government chose to bring any proceedings on the basis of the information in its possession. Second, the judgment should be affirmed because the complaint contains no allegation nor is there any showing that the action has been authorized by the Commissioner of Internal Revenue or the Attorney General, as required by 26 U.S.C.A. § 3740. Third, the judgment should be affirmed because the complaint does not allege facts on which appellee can be held liable under 31 U.S.C.A. § 231. Any other error, if any, in the proceedings below was not prejudicial.

ARGUMENT

I.

Judgment May Be Affirmed on Grounds Not Relied Upon by District Court

The court below in its order of dismissal gave as grounds for dismissal that "it * * * appears from the complaint that this suit is based upon evidence and information in the possession of the United States and of agencies, officers and employees thereof at the time this suit was brought, and that all matters or facts alleged in the complaint as amended were matters of public record." The court declined to rule upon whether or not the suit was required to be authorized or sanctioned by the Commission of Internal Revenue or the Attorney General, and also expressed the opinion that sufficient facts had been alleged on which liability under 31 U.S.C.A. § 231 could be predicated (R 87-88). Appellant's notice of appeal purports to effect an appeal not only from the judgment for appellee, but also from the order of dismissal. The order itself, however, is not appealable; hence the notice of appeal brings before this Court for affirmance or reversal only the judgment itself.

Prickett v. Consolidated Liquidating Corp., 180 F.2d 8 (9 Cir. 1950). This Court has repeatedly held that it could and would sustain judgments brought to it for review upon any proper ground disclosed in the record, whether relied upon, rejected, or not decided by the court below. *Town of South Tucson v. Tucson Gas, Electric Light and Power Co.*, 149 F.2d 847 (9 Cir. 1945); *Peterson v. Coast Cigarette Vendors*, 131 F.2d 389 (9 Cir. 1943); *Pevely Dairy Co. v. Borden Printing Co.*, 123 F.2d 17 (9 Cir. 1941). In *L. McBryne Co. v. Silverman*, 121 F.2d 181, 182 (9 Cir. 1941), the court said: "That we may affirm on a ground not assigned by the trial court is well settled." Therefore, even if this Court should find that the judgment could not be sustained upon the grounds given by the court below, the judgment must nevertheless be affirmed if it is found either that the action should have been dismissed because the complaint did not allege authorization for the action from the Commissioner of Internal Revenue or the Attorney General in compliance with 26 U.S.C.A. § 3740, or that the complaint did not state sufficient facts from which appellee could be held liable under 31 U.S.C.A. § 231.

II.

The District Court Correctly Dismissed the Action as Based Upon Evidence or Information Already in the Possession of the United States and Its Agencies, Officers and Employees.

31 U.S.C.A. § 232 provides that a District Court shall have no jurisdiction to proceed with any suit such as the present one "whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought." Obviously, the only evidence or information upon which this action can be

based is that which will sustain appellant's charge that appellee knowingly made or presented, or caused to be made or presented, false, fictitious, or fraudulent tax returns or refund claims within the meaning of 31 U.S.C.A. § 231. It appears from the complaint that all such evidence or information would have to be included within the following categories:

1. Facts pertaining to appellee's liability for income and excess profits taxes for 1942, 1943 and the first four months of 1944.

(a) Income, gains, expenses, losses, etc., of appellee and each of its affiliated corporations realized or incurred during those periods.

(b) Facts relevant in determining whether appellee and the holding company were "affiliated" within the meaning of § 23(g)(4)¹⁴ and § 141¹⁵ of

¹⁴See footnote 3 of Judge Goodman's opinion quoted on page 6, *supra*.

¹⁵"§141. Consolidated returns.

"(a) Privilege to file consolidated income and excess-profits-tax returns. An affiliated group of corporations shall, subject to the provisions of this section, have the privilege of making consolidated income and excess-profits-tax returns for the taxable year in lieu of separate returns. * * *"

"(d) Definition of 'affiliated group.' As used in this section, an 'affiliated group' means one or more chains of includible corporations connected through stock ownership with a common parent corporation which is an includible corporation if—

"(1) Stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of each of the includible corporations (except the common parent corporation) is owned directly by one or more of the other includible corporations; and

"(2) The common parent corporation owns directly stock possessing at least 95 per centum of the voting power of all classes of stock and at least 95 per centum of each class of the nonvoting stock of at least one of the other includible corporations.

As used in this subsection, the term 'stock' does not include non-voting stock which is limited and preferred as to dividends."

the Internal Revenue Code, during the period in question.

(1) The amount of appellee's outstanding stock and the amount of such stock held by the holding company during that period.

(2) The history of the reorganization proceedings of appellee, but only to the extent that such proceedings affected the holding of appellee's stock by the holding company within the meaning of §§ 23(g)(4) and 141 of the Internal Revenue Code.

2. Statements concerning these matters made in tax returns and claims filed with the Internal Revenue Bureau.

The complaint, together with facts of which the court will take judicial notice, shows that all of the evidence or information in the above categories which is relied upon by appellant as a basis for this action was in the hands of at least two agencies of the United States and officers or employees thereof at the time this action was brought. These agencies are the District Court of the United States for the Northern District of California and the Bureau of Internal Revenue.

A. KNOWLEDGE OF THE DISTRICT COURT FROM PRIOR PROCEEDINGS.

It is clear from Judge Goodman's opinion in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, 85 F. Supp. 868, handed down on September 6, 1949, and incorporated into the present complaint (R 21), that in that proceeding the District Court and Judge Goodman received all, or substantially all, the evidence and information upon which appellant has brought the present

action.¹⁶ Indeed, on pages 42-43 of appellant's brief appellant appears to concede that Judge Goodman had all the evidence and information on which appellant is relying. His objection is not that Judge Goodman did not have all the relevant facts before him, but that the judge drew the wrong legal conclusions from those facts.

The judge's opinion makes clear that he felt the same indignation so vehemently expressed by appellant that the United States had not received all the taxes that were coming to it for the years in question, for the opinion states on 85 F. Supp. at 874: "If I had the power, I would not hesitate to set aside the tax settlement. Indeed, if I could, I would order these taxes paid to the United States." But the opinion concludes on 85 F. Supp. at 873: "Obviously the Court cannot pass judgment upon the validity of the tax compromise and settlement. It is now closed. It is final and **cannot be reopened except for fraud.**" If a federal district judge, with all the facts before him, and with a strong feeling that the United States Government has not been paid its just taxes, appears convinced that no fraud was practiced upon the Government and therefore no redress is available, can the *qui tam* statute be said to permit some unknown individual who considers his legal knowledge superior to that of the district judge to take up the time of the courts with an action based on a legal theory of fraud which the judge has already carefully considered and reluctantly rejected? Clearly under the statute it is sufficient to deprive the district court of jurisdiction if the agency

¹⁶"The trial itself consumed 13 days; the proceedings are set forth in 1,700 pages of transcripts; 14 witnesses testified and 164 exhibits, with various subdivisions, were introduced in evidence." 85 F. Supp. at 871.

or officer of the United States has the evidence or information on which the action is based; it is not necessary that the agency or officer agree with the legal theory upon which the plaintiff proposes to proceed.

Appellant's rhetorical question at the bottom of page 43 of his brief appears to imply, however, that evidence or information in the hands of a federal district judge is not evidence or information in the possession of an agency or officer of the United States within the meaning of the statute. His contention is that an agency of the United States within the meaning of the statute must be one either capable itself of redressing the fraud or capable of setting into motion another agency which can redress the fraud. (Aplt. bf. 37)¹⁷

Yet the statute itself contains no such qualification to the phrase "the United States, or any agency, officer or employee thereof," and no such qualification can or should be read into it. Even if it were to be required, however, that the agency possessing the information or evidence be at least one capable of setting into motion another agency which can redress the fraud, it is clear that a district court of the United States would have to be considered such an agency. It is well known that district judges frequently refer evidence of perjury or other offenses which come before them in the course of criminal or civil proceedings to the United States attorney or the grand jury for proper action. Surely a district court is as capable of setting into motion an agency which can redress the fraud as is a legis-

¹⁷Appellant's third requirement, that "such possession of evidence actually leads to and results in bona fide and vigorous action toward the redressing of the fraud," is answered as pp. 28-32, *infra*.

lative committee such as the House Naval Affairs Committee, which appellant cites as an example of the type of agency he has in mind (Aplt. bf. 37, n. 12).¹⁸

B. KNOWLEDGE OF THE BUREAU OF INTERNAL REVENUE.

If there is any agency in whose hands evidence or information on which this action is based would defeat the jurisdiction of the district court, it is the Bureau of Internal Revenue,¹⁹ for the detection and redress of tax frauds is the Bureau's primary responsibility.²⁰

¹⁸The example of the House Naval Affairs Committee is taken from the case of *United States ex rel. McLaughlin v. American Chain and Cable Co.*, 62 F. Supp. 302 (1945), one of the two cases on which the court below relied in dismissing the complaint (R 87). In that case the *qui tam* action had been brought before December 23, 1943, and the question was the effect of the proviso in 31 U.S.C.A. §232(C) "That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice." The court, in dismissing the complaint, said, "*** It is abundantly clear that all the material information for the suit was solicited by the Government, before the relator filed suit on February 11, 1943, from hearings held by the House of Representatives Committee on Naval Affairs ***. It also had the information set forth in a complaint of the Federal Trade Commission ***."

¹⁹The complaint does not charge knowledge of or complicity in the fraud on the part of officers or employees of the Bureau, as was the case in *United States v. Rippctoe*, 178 F.2d 735 (4 Cir. 1949), where complicity on the part of Government officials was alleged. On the contrary, the general conclusory allegations of fraud in the complaint are to the effect that the Bureau was the very agency of the United States which relied on the appellee's "fraudulent" representations to the detriment of the Government. The remark in the *Rippctoe Case* that it is not "incumbent upon plaintiff to negative knowledge on the part of Government officials of the evidence upon which its action is based" is clearly inapplicable where the complaint itself, read in the light of the relevant presumptions and matters of judicial knowledge, affirmatively shows that the Government officials did have such knowledge.

²⁰26 U.S.C.A. §3654 provides:

"(a) *Collectors.* Every collector within his collection district

There is a presumption that officers of the government properly carry out the duties imposed upon them by law.²¹ It is therefore to be presumed that the Bureau of Internal Revenue had ascertained all the facts pertaining to the liability of appellee and its affiliated corporations for income and excess profits taxes during the period in question except insofar as the complaint specifically alleges that the Bureau did not have knowledge of such facts. Moreover,

shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. For such purposes, he shall have power to examine all persons, books, papers, accounts, and premises, to administer oaths, and to summon any person to produce books and papers, or to appear and testify under oath before him, and to compel compliance with such summons in the same manner as provided in section 3615."

"(c) *Internal Revenue Agents.* Every internal revenue agent shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, and shall aid in the prevention, detection, and punishment of any frauds in relation thereto. 53 Stat. 446."

26 U.S.C.A. §3901 provides:

(a) *Assessment and Collection.* "The Commissioner, under the direction of the Secretary—

(1) *General Superintendence.* Shall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue; * * *."

The general responsibility of the Commissioner of Internal Revenue for the assessment and collection of taxes is the reason for the requirement in 26 U.S.C.A. §3740 that all actions such as this one for the recovery of taxes or of any fine, penalty or forfeiture be authorized by the Commissioner. The absence of such authority in the allegations of the present complaint gives an additional reason for affirming the judgment of the District Court. See pages 31-32, *infra*.

²¹*Bonds v. Sherburne Mercantile Co., et al.*, 169 F.2d 433, 435 (9 Cir. 1948); *United States Hoffman Machinery Corporation v. Lauchli*, 150 F.2d 301 (8 Cir. 1945); see *Stone v. Stone*, 136 F.2d 761, 763 (D.C. Cir. 1943). In *Lancaster v. United States*, 153 F.2d 718 at 723 (1 Cir. 1946) the court stated: "Dereliction of duty on the part of a governmental agency is not to be guessed at but must be indicated by some evidence."

there is a presumption against the presence of fraud in transactions between parties dealing at arms-length.²² It is therefore also to be presumed that appellee and its affiliated corporations concealed no material facts from the Bureau except to the extent that such concealment is alleged in the complaint. Examined carefully and in the light of matters of which this Court will take judicial notice, the complaint alleges no such concealment.

The only specific representations which the complaint alleges to have been made to the Bureau are contained in sub-paragraphs c, d and e of paragraph 60 of the complaint (R 48-50). All of these alleged representations either were true or were immaterial or concerned matters of which the Bureau already had full knowledge.

The first alleged representation is set forth in the complaint as follows: "The settlement was predicated upon a belief by the Internal Revenue Bureau, induced by the fraud and fraudulent representations of the defendant that the Tax Returns for the three tax periods were in fact, truth and reality made and submitted by the Holding Company, whereas they were made by the defendant itself in the name of the Holding Company and without the Holding Company's knowledge" (R 48-49).

Section 52(a) of the Internal Revenue Code provides that corporation income tax returns "shall be sworn to by the president, vice-president, or other principal officer and by the treasurer, assistant treasurer, or chief accounting officer." Treasury Regulation 104, § 23.12(d) contains the

²²*Zell v. Bankers' Utilities Co.*, 77 F.(2d) 22 (9 Cir. 1935); *Budd v. Commissioner of Internal Revenue*, 43 F.2d 509 (3 Cir. 1930); *United States v. Eleven Certain Parcels of Land in Tulare County, California*, 45 F. Supp. 289 (S.D. Calif. 1942).

same provision with respect to consolidated returns. As hereinbefore pointed out,²³ the complaint alleges that the returns were signed by the president of the holding company (R 24, 37). If the returns were executed by the president of the holding company, they were, under the statute and regulations, executed "by" the holding company. It is not clear from the complaint what officials of the holding company appellant thinks would have had to have knowledge of the returns to constitute that knowledge the knowledge of the holding company itself. In any event, the complaint alleges that the "holding company," acting through whom it is not specified, ratified the returns before they had been finally approved by the Bureau (R 25-27, 38, 40).

The next specific representation alleged is as follows: "The settlement was predicated upon a belief by the Internal Revenue Bureau, induced by the fraud and fraudulent representations of the defendant, that the Holding Company was at the times in question still the Parent Corporation of the defendant by virtue of the ownership of at least 95% of defendant's VALID capital stock * * *, whereas said Holding Company had in fact no right, title, interest or ownership whatever in or to defendant or to defendant's property or assets * * *" (R 49).

Judge Goodman's opinion specifically says on 85 F. Supp. at 870, page 5, *supra*, that the holding company's stock in appellee was not transferred to the reorganization committee until April 1944. Since that statement in the opinion is incorporated by reference in the complaint, and the complaint does not elsewhere contradict the fact that the stock was held by the holding company until April 1944, the gen-

²³See p. 9, *supra*.

eral allegation that the "Holding Company had in fact no right, title, interest or ownership whatever in or to defendant or to defendant's property or assets" is a mere legal conclusion and not an allegation that the stock was not in fact held. If it be said that the representation "that the Holding Company was at the times in question still the Parent Corporation of the defendant by virtue of the ownership of at least 95% of defendant's VALID capital stock" was untrue because the stock was not "valid," in that it did not render the holding company a parent corporation, that is a question of law under the Internal Revenue statutes and regulations, of which the Bureau can hardly be said not to have complete knowledge!

The third representation to the Bureau is alleged as follows: "The settlement was predicated upon a belief by the Internal Revenue Bureau, induced by the fraud and fraudulent representations of the defendant, * * * that the Holding Company at such times had and exercised sole, exclusive and absolute control over defendant, whereas * * * not only did it [the holding company] not exercise sole, exclusive and absolute control over defendant, but on the contrary, it had no say whatever in or about the conduct of defendant or defendant's business * * *." (R 49).

If such a representation was made, it was wholly immaterial and extraneous to the truth or falsity of any claim for relief from tax liability or for tax refunds on the part of the holding company or appellee. The sole statutory test of affiliation, or status as a parent corporation, under §§ 23(g)(4) and 141 of the Internal Revenue Code is 95% stock ownership.²⁴ Furthermore, the only information re-

²⁴See notes 14, 15 on p. 15, *supra*. In *United States v. Cleveland, P. & E. R. Co.*, 42 F.2d 413, 418 (6 Cir. 1930), the court said with

quired on the prescribed consolidated returns with respect to the relationship between the affiliated corporations filing the return is the amount of capital stock outstanding in each subsidiary corporation and the amount of such stock held by each of the member corporations of the affiliated group.²⁵ Thus no representation one way or the other was required by law to be made concerning the control exercised over appellee by the holding company, and if such a representation were made informally to the Internal Revenue Bureau, entirely apart from the information required on the return, such representations would by no means constitute the making or presenting of a false or fraudulent "claim" within the meaning of 31 U.S.C.A. § 231. *United States ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178 (2 Cir. 1936), cert. denied, 299 U.S. 576, 81 L.Ed. 424.

Even if the alleged representation were material, the Internal Revenue Bureau must be deemed to have known that the holding company was not at the time in question exercising sole, exclusive and absolute control over the appellee. Otherwise the Bureau would have to be ignorant

respect to similar internal revenue statutory provisions: "* * * Congress made determinative not actual control of the related companies, but the substantial *ownership* or *control* of their *stock*, or of the *stock* of the subsidiary by the parent company."

²⁵Treasury Regulation 104, §23.12 requires that the consolidated returns be executed by the parent corporation on form 1120, the regular corporation return form. It must be accompanied by copies of form 1122, a consent to the filing of a consolidated return, to be executed by each of the subsidiary corporations. In addition, the parent corporation must file an "affiliation schedule" on form 851, which calls for the information concerning the stock ownership of the subsidiary corporations and the holding of such stock by the other members of the group. Samples of these forms for the years 1943 and 1944 may be found in plaintiff's exhibits 4a and 5a, part of the record on appeal in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, pending in this Court as No. 12506.

of the fact that appellee was at that time in reorganization under § 77 of the Bankruptcy Act. That the Bureau was not unaware of the reorganization proceedings is conclusively shown by the fact that the holding company applied to the Bureau for extensions of time within which to file both its 1943 and its 1944 returns on the express ground that there had been delay in the preparation of such returns caused by the reorganization proceedings. These applications for extension of time and the granting thereof by the Bureau appear in plaintiff's exhibits 4a and 5a in *Western Pacific Railroad Corporation v. Western Pacific Railroad Company*, 85 F. Supp. 868 (N.D. Calif. 1949), now on appeal to this Court as No. 12506.²⁶ That case was tried

²⁶Exhibit 4a:

"The Western Pacific Railroad Corporation. Year 1943. Statement accompanying form 1134. Application for extension of time for filing income and excess profits tax returns.

"* * * The further extension requested herein is necessary by reason of the following facts:

"The Western Pacific Railroad Company, the principal operating subsidiary of this consolidated group, is in the process of reorganization under the provisions of § 77 of the Federal Bankruptcy Act. * * *"

"June 5, 1944. Receipt is acknowledged of your application dated June 1, 1944 requesting a further extension of time within which to file corporation Income and Excess Profits Tax Returns, forms 1120 and 1121, for the year ended December 31, 1943 * * *. Very truly yours, Joseph D. Nunan, Jr., Commissioner. By: William J. Pedrick, Collector."

Exhibit 5a:

Form 1134. "February 26, 1945. * * * This extension is necessary by reason of the following facts: (see statement attached)."

"Statement accompanying Form 1134.

"This extension is necessary for the following reasons:

"As of January 1, 1945, The Western Pacific Railroad Company emerged from trusteeship under section 77 of the Federal Bankruptcy Act, as amended, and the accounting entries to record this recapitulation have not yet been approved by the Interstate Com-

in the same district court in which the present action was brought, and is pending on appeal in the same court in which this appeal is pending. The defendant-appellee in that case is also the defendant-appellee in this case. The subject matter of both actions is the alleged "tax saving" accomplished by the filing of consolidated returns in 1942, 1943 and 1944 by the holding company and appellee. Under such circumstances both this Court and the Court below will make use of established and uncontradicted facts which may be ascertained from an examination of the records in a former case in the same court between at least one of the parties and others relating to the same subject matter.²⁷ This court has said that "if by judicial knowledge we know that the fact pleaded is out of harmony with the fact judicially known, the allegation is disregarded. *Greeson v. Imperial Irrigation District*, 9 Cir., 59 F.2d 529, 530, and cases cited." *Verde River Irr. & Power Dist. v. Salt River Valley Water*

merce Commission, the regulatory body having direction over the books and accounts of this carrier. For this reason and because of the burdens imposed on account of war conditions, an extension of ninety days from March 15 will be required to complete these returns."

"February 27, 1945. Gentlemen: Reference is made to your application dated February 26, 1945 requesting an extension of time within which to file * * * for the period May 1, 1944 to December 31, 1944.

"In view of the reasons stated, an extension of time for such period as may be necessary but not later than June 15, 1945 is hereby granted * * *. Joseph D. Nunan, Jr., Commissioner. By: Wm. J. Pedrick, Collector."

²⁷*United States v. Pink*, 315 U.S. 203, 86 L.Ed. 796 (1942); *National Fire Ins. Co. v. Thompson*, 281 U.S. 331, 74 L.Ed. 881 (1930); *A. G. Reeves Steel Const. Co. v. Weiss*, 119 F.2d 472 (6 Cir. 1941), (cert. den. 314 U.S. 677, 86 L.Ed. 541); *United States v. Mayerhofer*, 56 F. Supp. 252 (S.D. Calif. 1944).

Users' Ass'n, 94 F.2d 936, 941 (9 Cir. 1938). It is respectfully submitted that this Court should take judicial notice of the fact that the Bureau of Internal Revenue did know that appellee was in reorganization during the period in question, as evidenced by the Bureau's grant of an extension of time in which to file consolidated returns based on the fact that appellee was then in reorganization.

The fourth and last specific representation alleged to have been made to the Bureau of Internal Revenue is contained in the following allegations: "The settlement was predicated upon a belief by the Internal Revenue Bureau induced by the fraud and fraudulent representations of defendant, that the \$17,505,636.03 tax saving accomplished by the settlement would go, inure and accrue to the Holding Company in mitigation of its \$75,000,000 stock loss in defendant's capital stock, whereas in reality no part of such tax saving went, inured or accrued to the Holding Company and it was never the intention of defendant who was the mastermind and perpetrator of the whole swindling scheme, that any part of the \$17,505,636.03 should go, inure, or accrue to anybody but itself * * *" (R 49-50).

Which of the member corporations of an affiliated group filing a consolidated return pay a particular tax or receive the benefit of a particular tax saving is, of course, of no importance to the Government in determining and collecting the proper amount of taxes owed. The dispute in the litigation between the holding company and appellee, now pending in this court as No. 12506, over whether appellee should pay to the holding company all or a part of the decrease in its tax liability for 1942, 1943 and 1944 arising from the inclusion of the holding company's \$75,000,000

stock loss in the consolidated returns for those years is not relevant to the question of whether the Government was defrauded out of taxes by appellee. The Government had and has no interest whatsoever in the dispute between appellee and the holding company. The Government's only interest was and is to assess and collect the taxes rightfully due it. False representations concerning matters in which the Government has no interest do not constitute and form no part of a false claim which can be made the basis of liability under 31 U.S.C.A. §231. *United States ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178 (2 Cir. 1936), cert. den. 299 U.S. 576, 81 L.Ed. 424.

C. NO REQUIREMENT THAT GOVERNMENT PROSECUTE SO LONG AS IT HAS KNOWLEDGE.

Appellant contends that it is not enough to deprive the district court of jurisdiction in this type of proceeding that the action be shown to be based upon evidence or information in the possession of the United States or any agency, officer or employee thereof at the time the suit is brought. He contends that even in that situation the district court retains jurisdiction unless it also appears that a Governmental agency is prosecuting or preparing to prosecute the Government's own action on the same claim (Aplt. Bf. 37, 55-56, 72). No such exception appears in the statute. The jurisdiction of the district court in an action such as this one is derived from 31 U.S.C.A. § 232 (A). § 232 (B) provides: "Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States * * *." § 232(C) provides: "The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit

brought under this section whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however,* That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice." Apart from the proviso, which applies only to actions brought before December 23, 1943, this provision is a flat limitation on the jurisdiction of the district court in this type of action. If a Governmental agency or officer had possession of the necessary evidence or information, that alone is sufficient to deprive the court of jurisdiction, regardless of what the agency or officer does with such information. The trouble with appellant's cases is that they all deal with actions brought before December 23, 1943. Awareness of this fact is especially necessary to a correct understanding of the quotation on pages 60 and 61 of appellant's brief from *United States ex rel. Coates v. St. Louis Clay Products Co.*, 68 F. Supp. 902, 904-905 (E.D. Mo. 1946). As a previous report of that case in 65 F. Supp. 645 shows, the complaint in that case was filed April 24, 1943. It was held in the prior opinion that the plaintiff had voluntarily disclosed to the Attorney General substantial evidence and information not theretofore in the possession of the Department of Justice so as to bring his action within the proviso and preserve the jurisdiction of the district court. The remarks quoted in appellant's brief, therefore, were directed to a situation

in which the provision which deprives the district court of jurisdiction in this action was not applicable.

In *United States v. Baker-Lockwood Manufacturing Co.*, 138 F.2d 48 (8 Cir. 1943), quoted and discussed in appellant's brief at pages 38, 50-51, 69-70, not only had the action been brought before December 23, 1943, but the appellate decision itself was handed down before that date, which was the date on which the restrictive amendments to 31 U.S.C.A. §§231-235 became effective. The full text of those sections before and after the amendments is set forth in the appendix to this brief. A comparison of those sections before and after the amendments will clearly show a congressional intent to restrict drastically the privilege of private individuals to bring *qui tam* actions. One of these restrictions was the flat and absolute elimination of all such suits based upon evidence or information already in the possession of a Governmental agency or officer. Appellant would have this Court read into this absolute elimination a qualification which is not there, namely, that the private action be dismissed only when the Governmental agency or officer not only has the information or evidence but is acting thereon. The complete answer to such a contention is the quotation in appellant's brief on page 52 from the syllabus of *United States v. Cooper Corp.*, 312 U.S. 600, 85 L.Ed. 1071 (1941): "In construing a statute, it is not the function of courts to engraft on [the] statute additions which the court thinks the legislature logically might or should have made."

III.

**Present Action Required Authorization by Commissioner
of Internal Revenue and Attorney General**

Section 3740 of the Internal Revenue Code provides: "No suit for the recovery of taxes, or of any fine, penalty, or forfeiture, shall be commenced unless the Commissioner authorizes or sanctions the proceedings and the Attorney General directs that the suit be commenced." There is no allegation in the complaint that the Commissioner has authorized or sanctioned these proceedings or that the Attorney General has directed that this suit be commenced. The absence of such an allegation or showing requires the dismissal of this action.

Olson v. Mellon, 4 F. Supp. 947 (W.D. Pa. 1933), is a case squarely in point. In that case there were two *qui tam* actions, brought under 31 U.S.C.A. §§ 231-235, in which the plaintiff alleged that the defendant had defrauded the United States of income tax due by means of a false and fraudulent return and sought recovery on behalf of the United States and himself for twice the amount of the alleged unpaid tax and the statutory penalty of \$2,000 imposed upon one who has presented a false claim against the United States. One of the grounds on which the demurrers to the complaints were sustained was that there was no allegation that the plaintiff had obtained the permission of the Commissioner of Internal Revenue to bring the action as required by Revised Statutes § 3214, from which § 3740 of the Internal Revenue Code is derived. The court said in 4 F. Supp. at 950: "We know of no rule in relation to construction of statutes which takes the instant cases out of the purview of § 3214, Rev. St. As we interpret

it, it discloses a plain intent on the part of Congress to keep all cases for the collection of internal revenue taxes, fines, penalties, and forfeitures under the supervision of the Commissioner of Internal Revenue. It was existing law when it and sections 3490-3494 [31 U.S.C.A. §§ 231-235] became part of the Revised Statutes * * *. The sections may well exist together."

As pointed out earlier in this brief,²⁸ the prevention, detection, and punishment of fraud with respect to internal revenue taxes is one of the primary responsibilities of the Bureau of Internal Revenue. It was clearly the intent of Congress in enacting § 3740 of the Internal Revenue Code to enable the Bureau to discharge this responsibility most effectively by giving it complete supervision over all suits brought for the recovery of taxes or of penalties or forfeitures relating to taxes. Cf. *Johnson v. Thomas*, 16 F. Supp. 1013, 1017 (N.D. Tex. 1936). If for no other reason, the judgment of dismissal must be affirmed for failure to comply with § 3740.

IV.

The Complaint Does Not Allege Facts on Which Appellee Can Be Held Liable Under 31 U.S.C.A. § 231

The question of whether appellee or its affiliated corporations should have paid more income and excess profits taxes than it did for the years 1942, 1943 and 1944 is not an issue in this case. The gravamen of this action is not insufficient payment of taxes, but the making of a false, fictitious or fraudulent claim on the United States within the meaning of 31 U.S.C.A. § 231. In a discussion of § 231 in *United States ex rel. Brensilber v. Bausch & Lomb Optical*

²⁸See note 20, on p. 19, *supra*.

Co., 131 F.2d 545 (2 Cir. 1942), *aff'd.*, 320 U.S. 711, 88 L.Ed. 417, the United States Court of Appeals for the Second Circuit said: “* * * the statute certainly makes fraud of some sort the basis of the liability, and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives, ‘false,’ ‘fictitious,’ and ‘fraudulent’.” To establish liability under § 231, therefore, a complaint must allege all the elements of common law deceit for fraud—a representation of one or more **material**²⁹ facts, either recklessly made or known to be false, with the intention that the representation be acted upon by another party, and actual reliance on the representation by the other party to his injury.³⁰ The misrepresentation must be one of fact; misrepresentations of law are not a basis for deceit where there is no fiduciary relationship or other circumstance which would lead the person making the representation of law to believe that the other party was reasonably relying upon it.³¹ It is obvious that no taxpayer could reasonably believe that the Internal Revenue Bureau would rely upon his representation as to Internal Revenue law.

As shown above, the general allegations and characterizations of fraud in the complaint are of no effect except as they are supported by allegations of specific representations made to the Internal Revenue Bureau, which is the

²⁹See *Twachtman v. Connelly*, 106 F.2d 501, 506 (6 Cir. 1939).

³⁰On elements of fraud, see *Bell v. Morley*, 223 Fed. 628 (9 Cir. 1915); *Boatmen's Nat. Co. v. M. W. Elkins & Co.*, 63 F.2d 214 (8 Cir. 1933); *C. W. Denning & Co. v. Suncrest Lumber Co.*, 51 F.2d 945 (4 Cir. 1931).

³¹*Mutual Life Ins. Co. of New York v. Phinney*, 178 U.S. 327, 44 L.Ed. 1088 (1900); *Fawcett v. Sun Life Assur. Co. of Canada*, 135 F.2d 544 (10 Cir. 1943); *Meacham v. Halley*, 103 F.2d 967 (5 Cir. 1939), (cert. den. 308 U.S. 572, 84 L.Ed. 480).

only agency through which the United States is alleged to have been "defrauded."³² The specific representations alleged have been discussed in detail above in connection with the argument that the Bureau of Internal Revenue had sufficient evidence or information on which this action is based to deprive the District Court of jurisdiction.³³ It can be seen from that discussion that all of the alleged representations lack one or more of the elements of fraud.

1. The representation that the tax returns were made and submitted by the holding company (R 48): As pointed out earlier, the complaint alleges that the tax returns were signed by the president of the holding company and ratified by other undesignated individuals referred to in the complaint as "the holding company." (R 24-25, 27, 37-38, 40). The statute and regulations require only that corporation returns be signed by the officers of the corporation.³⁴ Therefore this representation was not a representation of fact but a representation of a legal conclusion that the persons making the return had made it on behalf of the holding company. It was a representation of law rather than fact, and, we submit, a correct one.

2. The representation that the holding company was at the times in question the parent corporation of appellee by virtue of the ownership of at least 95% of appellee's "valid" capital stock (R 49): As shown above, the representation that the holding company held at least 95% of appellee's capital stock was a true one. The representation that such holdings of stock constituted the holding

³²See note 11, at p. 11, *supra*.

³³See pp. 20-28, *supra*.

³⁴See pp. 21-22, *supra*.

company the parent corporation of appellee within the meaning of § 23(g)(4) and § 141 of the Internal Revenue Code was nothing more than a representation of a conclusion of law, and, again, a correct one.³⁵

3. The representation that the holding company at the times in question was exercising sole, exclusive and absolute control over appellee (R 49): Such a representation, of course, was not true. In the first place, however, it was immaterial, for the sole criterion of affiliation for status as a parent corporation under § 23(g)(4) and § 141 of the Internal Revenue Code is 95% stock ownership.³⁶ In the second place, this Court will take judicial notice of the facts shown by plaintiff's exhibits 4a and 5a in case No. 12506, now pending in this Court, a case involving one of the same parties and substantially the same subject matter as this case. Those exhibits show that counsel representing appellee and the holding company applied to the Bureau for, and the Bureau granted, permission to file late returns for the years 1943 and 1944 on the grounds of delay caused by the fact that appellee was in reorganization and under the supervision of court-appointed trustees.³⁷ Since appellee's counsel knew that the Bureau had already been informed that the holding company was no longer exercising exclusive and absolute control over appellee, a representation to the contrary cannot have been made with any serious intent that the Bureau would rely thereon.³⁸

³⁵See pp. 22-23, *supra*.

³⁶See Court's Footnote 3 on p. 6, *supra*; note 15 on p. 15, *supra*; note 24 on p. 23, *supra*.

³⁷See pp. 25-27, *supra*.

³⁸See *Gleason v. Thaw*, 234 Fed. 570, 575 (2 Cir. 1916).

4. The representation that the alleged tax saving accomplished by the settlement with the Bureau would go, inure and accrue to the holding company: This representation was wholly immaterial to any question concerning appellee's or the holding company's liability for income or excess profits taxes. An immaterial misrepresentation furnishes no ground of liability under 31 U.S.C.A. § 231.³⁹

V.

Fact That Appellee Did Not Serve Appellant with Records of Prior Proceedings in Same Court Does Not Constitute Grounds for Reversal.

Appellant has specified as reversible error the refusal of the District Court to compel appellee to serve upon appellant and to file, along with the motion to dismiss and notice thereof, copies of all the records and proceedings in prior cases in the same court, involving one of the same parties, upon which appellee stated in its notice to appellant that it would rely in making the motion to dismiss (R 93). Appellant contends that appellee was required to do this because of Rule 3(b)(2) of the Rules of Practice of the District Court which requires a moving party to serve and file "copies of all evidentiary matter which he intends to submit in support of the motion * * *." (Aplt. Bf. 3, n. 1). A proper interpretation of this rule would not necessarily include within the phrase "evidentiary matter" the public records of prior proceedings in the same court involving one of the same parties. In any event, appellant cannot possibly have been prejudiced by the failure of appellee to serve and file such papers, for the District Court in its order of dismissal relied solely upon the complaint itself

³⁹*United States ex rel. Kessler v. Mercur Corp.*, 83 F.2d 178 (2 Cir. 1936), cert. denied, 299 U.S. 576, 81 L.Ed. 424.

(R 87). Furthermore, as shown above, the judgment of dismissal must be affirmed upon any appropriate ground regardless of whether such ground was relied upon by the court below. 28 U.S.C.A. § 2111 states the long-established rule: "Harmless error. On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

CONCLUSION

The judgment of dismissal should be affirmed on any one or more of the following grounds:

1. Possession by Government agencies and officers at the time this action was brought of evidence and information on which the action was based deprived the District Court of jurisdiction to proceed under 31 U.S.C.A. § 232.
2. This action was not authorized by the Commissioner of Internal Revenue or the Attorney General of the United States as required by 26 U.S.C.A. § 3740.
3. The complaint does not state sufficient facts to establish appellee's liability under 31 U.S.C.A. § 231.

It is respectfully submitted that any one of these grounds is sufficient to require that the judgment of the District Court be affirmed.

Dated: February 27, 1951.

C. W. DOOLING

Attorney for Appellee

A. B. DUNNE

DUNNE, DUNNE & PHELPS

Of Counsel

(Appendix follows)

APPENDIX

Title 31, U.S.C.A.

§231. LIABILITY OF PERSONS MAKING FALSE CLAIMS

Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the

receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of \$2,000, and in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit. (R.S. §§ 3490, 5438.)

§232. SAME; SUITS; PROCEDURE

(A) The several district courts of the United States, the District Court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall where-soever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit.

(B) Except as hereinafter provided, such suit may be brought and carried on by any person, as well for himself as for the United States, the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued

without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent.

(C) Whenever any such suit shall be brought by any person under clause (B) notice of the pendency of such suit shall be given to the United States by serving upon the United States attorney for the district in which such suit shall have been brought a copy of the bill of complaint and by sending, by registered mail, to the Attorney General of the United States at Washington, District of Columbia, a copy of such bill together with a disclosure in writing of substantially all evidence and information in his possession material to the effective prosecution of such suit. The United States shall have sixty days, after service as above provided, within which to enter appearance in such suit. If the United States should fail, or decline in writing to the court, during said period of sixty days to enter any such suit, such person may carry on such suit. If the United States within said period shall enter appearance in such suit the same shall be carried on solely by the United States. In carrying on such suit the United States shall not be bound by any action taken by the person who brought it, and may proceed in all respects as if it were instituting the suit: *Provided*, That if the United States shall fail to carry on such suit with due diligence within a period of six months from the date of its appearance therein, or within such additional time as the court after notice may allow, such suit may be carried on by the person bringing the same in accordance with clause (B) above. The court shall have no jurisdiction to proceed with any such suit brought under clause (B) or pending suit brought under this sec-

tion whenever it shall be made to appear that such suit was based upon evidence or information in the possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought: *Provided, however*, That no abatement shall be had as to a suit pending on December 23, 1943, if before such suit was filed such person had in his possession and voluntarily disclosed to the Attorney General substantial evidence and information which was not theretofore in the possession of the Department of Justice.

(D) In any suit whether or not on appeal pending on December 23, 1943, brought under this section, the court in which such suit is pending shall stay all further proceedings, and shall forthwith cause written notice, by registered mail, to be given the Attorney General that such suit is pending, and the Attorney General shall have sixty days from the date of such notice to appear and carry on such suit in accordance with clause (C).

(E)(1) In any such suit, if carried on by the United States as herein provided, the court may award to the person who brought such suit out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount which in the judgment of the court is fair and reasonable compensation to such person for disclosure of the information or evidence not in the possession of the United States when such suit was brought. Any such award shall in no event exceed one-tenth of the proceeds of such suit or any settlement thereof.

(2) In any such suit when not carried on by the United States as herein provided, whether heretofore or hereafter brought, the court may award to the person who brought

such suit and prosecuted it to final judgment, or to settlement, as provided in clause (B), out of the proceeds of such suit or any settlement of any claim involved therein, which shall be collected, an amount, not in excess of one-fourth of the proceeds of such suit or any settlement thereof, which in the judgment of the court is fair and reasonable compensation to such person for the collection of any forfeiture and damages; and such person shall be entitled to receive to his own use such reasonable expenses as the court shall find to have been necessarily incurred and all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court: *Provided*, That such person shall be liable for all costs incurred by himself in such case and shall have no claim therefor on the United States. As amended June 25, 1936, c. 804, 49 Stat. 1921; Dec. 23, 1943, c. 377, § 1, 57 Stat. 608.

§233. DUTY OF DISTRICT ATTORNEY AS TO SUCH CASES

It shall be the duty of the several district attorneys of the United States for the respective districts, for the District of Columbia, and for the several Territories, to be diligent in inquiring into any violation of the provisions of section 231-of this title by persons liable to such suit, and found within their respective districts or Territories, and to cause them to be proceeded against in due form of law for the recovery of such forfeiture and damages. And such person may be arrested and held to bail in such sum as the district judge may order, not exceeding the sum of \$2,000, and twice the amount of the damages sworn to in the affidavit of the person bringing the suit. (R.S. § 3492.)

§234. Repealed. Dec. 23, 1943, c. 377, §2, 57 Stat. 609

§235. LIMITATION OF SUIT

Every such suit shall be commenced within six years from the commission of the act, and not afterward. (R.S. § 3494.)

Before December 23, 1943, §§ 232 and 234 read as follows:

§232. SAME; SUITS

The several district courts of the United States, the district court of the United States for the District of Columbia, the several district courts of the Territories of the United States, within whose jurisdictional limits the person doing or committing such act shall be found, shall, where-soever such act may have been done or committed, have full power and jurisdiction to hear, try, and determine such suit. Such suit may be brought and carried on by any person, as well for himself as for the United States; the same shall be at the sole cost and charge of such person, and shall be in the name of the United States, but shall not be withdrawn or discontinued without the consent, in writing, of the judge of the court and the district attorney, first filed in the case, setting forth their reasons for such consent. (R.S. § 3491.)

§234. RIGHTS OF PERSONS PRESENTING SUCH SUITS

The person bringing said suit and prosecuting it to final judgment shall be entitled to receive one-half the amount of such forfeiture, as well as one-half the amount of the damages he shall recover and collect; and the other half

thereof shall belong to and be paid over to the United States; and such person shall be entitled to receive to his own use all costs the court may award against the defendant, to be allowed and taxed according to any provision of law or rule of court in force, or that shall be in force in suits between private parties in said court; *Provided*, That such person shall be liable for all costs incurred by himself in the case, and shall have no claim therefor on the United States. (R.S. § 3493.)

**In the United States Court of Appeals
for the Ninth Circuit**

MARGARET WHEELER HESS AND HARRY WESTBERG, INDIVIDUALLY AND AS DIRECTORS AND MEMBERS OF THE SMALL PROPERTY OWNERS LEAGUE, A NONPROFIT UNINCORPORATED ASSOCIATION, AND FOR AND ON BEHALF OF EACH AND ALL OF THE MEMBERS OF SAID ASSOCIATION, APPELLANTS

v.

TIGHE WOODS, THE HOUSING EXPEDITER OF THE UNITED STATES GOVERNMENT, OFFICE OF THE HOUSING EXPEDITER, DOES I TO XXX, INCLUSIVE, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLEES

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LEON J. LIBEU,

Assistant General Counsel,

NATHAN SIEGEL,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.

FILED

PAUL R. O'BRIEN,

CLEAR

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In the United States Court of Appeals for the Ninth Circuit

No. 12725

MARGARET WHEELER HESS AND HARRY WESTBERG, INDIVIDUALLY AND AS DIRECTORS AND MEMBERS OF THE SMALL PROPERTY OWNERS LEAGUE, A NONPROFIT UNINCORPORATED ASSOCIATION, AND FOR AND ON BEHALF OF EACH AND ALL OF THE MEMBERS OF SAID ASSOCIATION, APPELLANTS

v.

TIGHE WOODS, THE HOUSING EXPEDITER OF THE UNITED STATES GOVERNMENT, OFFICE OF THE HOUSING EXPEDITER, DOES I TO XXX, INCLUSIVE, APPELLEES

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLEES

STATEMENT OF THE CASE

This is an appeal from an order entered October 14, 1950, of the United States District Court for the Southern District of California, Judge Carter sitting, dismissing the complaint, denying appellants' application for a temporary restraining order and preliminary injunction to direct the Housing Expediter to terminate rent controls pursuant to Section 204 (j) (3) of the Housing and Rent Act of 1947, as amended;

and vacating the alternative writ of mandate heretofore issued by Judge W. Turney of the Superior Court, County of Los Angeles, California. The complaint, designated as a petition for writ of mandate and injunction, was originally filed in the Superior Court in the State of California, in and for the County of Los Angeles, and removed to this Court by the appellee, Tighe E. Woods, Housing Expediter of the Office of the Housing Expediter. Margaret Wheeler Hess and Harry Westberg sue individually and as Directors and Members of the Small Property Owners League which is alleged to be a nonprofit unincorporated association of owners of rental housing accommodations and real property in the City of Los Angeles (Par. 3, Complaint). As principal relief, the appellants pray that the Court grant a writ of mandamus commanding the appellee, Housing Expediter, to declare the decontrol of rents in the City of Los Angeles, pursuant to the provisions of Section 204 (j) (3) of the Housing and Rent Act of 1950 (U. S. C., App. 1894) (j) (3).¹ In addition, appellants

¹ The applicable law, Section 204 (j) (3) of the Housing and Rent Act of 1950 (50 U. S. C., App. 1894, (j) (3)), is as follows:

“(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town, or village, or in the unincorporated area of any county upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after 10 days’ notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town, or village or unincorporated area in such county: *Provided*, That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area.”

seek a negative injunction enjoining Ben C. Koepke, Area Rent Director, and other employees of the Office of the Housing Expediter from issuing any maximum rent orders or adjusting maximum rents in Los Angeles, from interfering with eviction proceedings by property owners in Los Angeles, or doing any act directed toward the administration of rent control in Los Angeles pursuant to the Housing and Rent Act of 1947, as amended.

The statutory provisions and proceedings of the Los Angeles City Council, leading to the present action are, briefly, as follows:

Section 204 (j) (3) of the Act requires the Housing Expediter to terminate federal rent control when the governing body of a locality meets the following conditions: (1) holds a public hearing, after ten days' notice, (2) makes a finding reached as a result of such hearing that a rental housing shortage requiring rent control no longer exists, and (3) transmits to the Housing Expediter such finding by a resolution adopted for that purpose in accordance with applicable local law.

On July 14, 1950, the City Council of Los Angeles, the appropriate governing body of that City, published a notice of a public hearing to be held on July 28, 1950, to determine whether or not there existed a shortage in rental housing accommodations in the city as to require the continuance of federal rent control. A hearing, the character of which is in dispute, was held on July 28, 1950, and, on the same day, the City Council, by a vote of 10 to 4, adopted a resolution, assertedly as a result of the public hearing,

finding that "there no longer exists such a shortage in rental housing accommodations as to require rent control in the City of Los Angeles, County of Los Angeles, State of California" (Par. 5 of Complaint). The resolution was received by the Housing Expediter on August 2, 1950 (Par. 6). Thereafter, on August 14, 1950, before any action on the resolution had been taken by the Housing Expediter, certain tenants of the City of Los Angeles filed a complaint in the United States District Court for the District of Columbia seeking an injunction to restrain the Housing Expediter from taking any action on the Los Angeles resolution which would cause the decontrol of maximum rents in the City (Par. 6) *Miller v. Woods* (D. C. D. C. No. 3528-50). The City of Los Angeles and the Small Property Owners League (plaintiff herein) intervened (Par. 6). A temporary restraining order, obtained on August 14, 1950, upon the filing of the complaint (Par. 6), was in effect throughout the proceedings in the lower court until that court dismissed the complaint.

Upon appeal the Court upheld the order dismissing the complaint upon the sole ground that the jurisdictional amount of \$3,000 was not shown to be present (*Miller v. Woods* (App. D. C. No. 10764, October 6, 1950)). The plaintiffs in the *Miller* case then applied to Chief Justice Vinson for a stay which was denied on October 7, 1950.²

² Thereupon, the tenants brought suit in the Municipal Court of the District of Columbia for like injunctive relief. The City of Los Angeles and the several landlords including plaintiff, Small Property Owners' League, again intervened on defendant's behalf.

On October 4, while the *Miller* case was still pending in the Circuit Court of Appeals for the District of Columbia, the instant suit was instituted in the Superior Court of the State of California. On October 9, 1950, the complaint was amended substituting Ben C. Koepke, Area Rent Director for the Los Angeles Defense-Rental Area in place of Doe 1 wherever it appears in the complaint. Service of the summons, Complaint, Writ, and Points and Authorities were served on appellees Tighe E. Woods, Housing Expediter, and Ben C. Koepke by personally leaving copies thereof with Koepke at the latter's office in Los Angeles. On October 10, 1950, the action was removed to the Federal District Court, and upon request of appellants, the District Court agreed to hear appellants' application for a temporary restraining order and preliminary injunction on October 13, 1950. Appellees' motion to dismiss the complaint was made returnable the same day.

Upon the hearing, appellants abandoned their count for mandatory injunction to compel the Expediter to act, and declared they sought only negative injunctive relief against the Area Rent Director.

After hearing, the court below concluded that the complaint should be dismissed as against Tighe E.

By memorandum opinion handed down October 23, 1950, the Court (Hon. George P. Barse, Chief Judge) determined that the complaint should be dismissed on the grounds that the suit was, in legal effect, against the United States, which had not consented to be sued; that the action was premature, since the Housing Expediter had not yet acted upon the resolution; and that plaintiff had failed to exhaust an apparently available remedy by not proceeding in a state court in California.

Woods, Housing Expediter, because jurisdiction was lacking over his person and that he could only be sued in the District of Columbia, his official residence; that the suit was premature; and that since the action sought to control the exercise of discretion by a government official it was beyond the power of a court to grant. The court below also dismissed the action against Ben C. Koepke, Area Rent Director, on the ground that the Housing Expediter is an indispensable party to the action; that the action is premature;³ and that the functions exercised by the Housing Expediter pursuant to Section 204 (j) (3) of the Act are not of a ministerial character. From the order dated October 14, 1950 dismissing the complaint and deny-

³ On October 23, 1950, after the court below had rendered its ruling, the Housing Expediter rejected the resolution of the City Council of Los Angeles by a letter addressed to that body. In view of that fact, this action may no longer be considered as premature.

Following issuance of the letter, suit was filed by a Los Angeles landlord, Frank W. Babcock, in the District Court for the District of Columbia, against the Housing Expediter for a mandatory injunction to compel the latter to terminate rent controls in Los Angeles. Simultaneously, application was made by Babcock for a preliminary injunction. The City of Los Angeles intervened in the suit. The Housing Expediter moved to dismiss this suit upon various jurisdictional grounds. After argument, the District Court (Judge Holtzoff sitting) denied the motion to dismiss, passed over the question of preliminary injunction, and granted the mandatory final injunction directing the Housing Expediter to terminate controls in Los Angeles. The Housing Expediter filed an appeal, and on November 20, 1950, pending appeal, the Circuit Court for the District of Columbia granted a stay of the district court's order. Appeal in this case was expedited and heard on November 22, 1950. On November 24, 1950, the Appellate Court reversed and dismissed the landlord's complaint.

ing a temporary restraining order and other injunctive relief against other appellees, appellants appealed, and pending appeal, sought a restraining order and a temporary injunction.

This Court rejected appellants' request for injunctive relief pending appeal with the statement that "No order with such far-reaching consequences should be made by any court before the merits of the controversy have been tried and adjudicated."

Contrary to appellants' contentions, it will be shown hereafter,

(1) that the court below properly dismissed the complaint and denied injunctive relief as to Tighe E. Woods, Housing Expediter, upon the ground that it lacked jurisdiction over him;

(2) that the court below was equally right in dismissing the complaint against other defendants, including Ben C. Koepke, Area Rent Director, upon the ground that the Housing Expediter is an indispensable party to the action, and because the functions which he exercises under the Act are not of a ministerial character;

(3) that the judgment below dismissing the complaint may also be sustained upon the grounds (a) that the action is one against the United States which has not consented to be sued; (b) that plaintiffs have no standing to sue or right to judicial review; and (c) that the plaintiffs fail to state a claim upon which relief may be granted in that they show no irreparable injury and in that they have an adequate remedy at law;

(4) that the court below did not abuse its broad equitable discretion in denying appellants' application for preliminary injunctive relief.

These contentions will be considered in order.

But preliminarily, it should be noted that appellants' action is predicated upon a resolution adopted by the City Council of Los Angeles in accordance with applicable law. The Appellate Court for the District of Columbia in *Babcock v. Woods*, No. 10827 on November 24, 1950, declared this resolution to be invalid as not complying with applicable law. The City of Los Angeles was a party to this action and is bound by the Court's ruling. Since the premise upon which this action rests has now been held to be untenable, there can be no escape from the conclusion that the action falls with the premise, and can no longer be sustained regardless of the outcome of any other issue raised in this case.

ARGUMENT

I

The court below correctly held it lacked jurisdiction over Tighe E. Woods, Housing Expediter, because he does not reside within the jurisdiction of this court

A. Objections to venue and jurisdiction of the Court over the person of defendants may be joined in a Motion to Dismiss with other grounds without waiving such jurisdictional objections

Before considering those grounds of the motion based upon objections to venue and jurisdiction over the person of the defendant Housing Expediter, reference is made to Rule 12 (b) of the Rules of Civil Procedure which provides that no defense or objection "is waiving by being joined with one or more defenses

or objections” in a responsive pleading or motion. And Civil Rule 12 (g) provides that all defenses and objections available to a party should be joined in one motion. Under these rules appellants may not be held to have waived jurisdictional objections by the general motion to dismiss (*Blank v. Bitker*, 135 F. 2d 962, 966 (C. A. 7th); *Orange Theater Corp. v. Rayherzst Amusement Corp.*, 139 F. 2d 871 (C. A. 3d)).

Considering Rule 12 in *Orange Theater Corp. v. Rayherstz Amusement Corp.*, *supra*, the Court holds that “A defendant need no longer appear specifically to attack the court’s jurisdiction over him” (139 F. 2d 874). In accord is the recent decision of *Federal Landlords Committee v. Woods*, 9 F. R. D. 622 (S. D. N. Y., 3 Judge Court, L. Hand, C. J. Leibell, J. Ryan, J.).

B. The Housing Expediter does not reside within the jurisdiction of this court, and may be sued only in the District of Columbia, where he resides

The applicable statute, 28 U. S. C. 1391 (b), which is a codification of Section 51 (a) of the Judicial Code (28 U. S. C. 112 (1946 ed.)), now repealed,⁴ plainly gives a defendant in a civil suit in a federal

⁴ The pertinent part of Section 51 (a) of the Judicial Code before the codification of Title 28 reads as follows:

“* * * no civil suit shall be brought in any district court against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant; * * *

district court the privilege of being sued only in the judicial district of which he is a resident. That Section reads as follows:

A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, except as otherwise provided by law.

In the instant case, it is clear that defendant, Tighe E. Woods, has at no time since the institution of this suit been a resident of California. Section 206 (e) of the Housing and Rent Act of 1947, as amended, provides that the principal office of the Housing Expediter shall be in the District of Columbia, and the affidavit filed by defendant Woods in support of his motion to dismiss states that his official residence has at all times since November 1, 1947, been in the District of Columbia, that his home is not in the State of California, and that he is not an inhabitant of that State.

It has been held under Section 51 (a) of the Judicial Code and its substantially similar predecessor statutes that, in the absence of a special statute to the contrary, a civil suit may not be maintained against a defendant without his consent in a federal district court except in the judicial district of which he is a resident at the time of suit⁵ (*Macon Grocery Co. v.*

⁵ Rule 4 (f) of the Federal Rules of Civil Procedure which outlines the territorial limits of effective service, provides that "All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held and, when a statute of the United States so provides, beyond the territorial limits of that state. * * *

Atlantic Coast Line R. R. Co., 215 U. S. 501; *Male v. Atchison, etc. Ry. Co.*, 240 U. S. 97; *Robertson v. Labor Board*, 268 U. S. 619; *Neirbo Co. v. Bethlehem Corp.*, 308 U. S. 165, 168).

Section 51 (a) of the Judicial Code made no distinction between a federal officer and a private person (nor does 28 U. S. C. 1391 (b) make any such distinction), and both the Supreme Court and the lower federal courts have long held and recognized that Section 51 (a) affords the same protection to federal officers as it did to private persons (*Berlinsky v. Woods*, 178 F. 2d 265 (C. A. 4th), certiorari denied, 70 S. Ct. 806; *Federal Landlords Committee, Inc., et al. v. Woods, Housing Expediter* (S. D. N. Y.), 3 Judge Court (L. Hand, Leibell, and Ryan sitting), 9 F. R. D. 622; *Butterworth v. Hill*, 114 U. S. 128; *United States v. Tacoma Oriental S. S. Co.*, 86 F. 2d 363 (C. A. 9th); *Smart v. Woods* (C. A. 6th), No. 11,157, October 27, 1950; *Peoples Bank v. Federal Reserve Bank of San Francisco*, 58 F. Supp. 25 (N. C. Cal. S. D.) Roche, J., appeal dismissed, 149 F. 2d 850 (C. A. 9th); *Bradley Lumber Co. v. National Labor Relations Board*, 84 F. 2d 97 (C. A. 5th), certiorari denied, 229 U. S. 559; *Howard v. United States ex rel. Alexander*, 126 F. 2d 667 (C. A. 10th), certiorari denied, 316 U. S. 699, rehearing denied, 317 U. S. 705; *Krug v. Fox*, 161 F. 2d 1013, 1020 (C. A. 4th); *Jewel Productions, Inc. v. Morgenthau*, 100 F. 2d 390 (C. A. 2d).

In *Berlinsky v. Woods*, 178 F. 2d 265 (C. A. 4th), an action was instituted by a tenant in the District Court of Maryland to compel the Housing Expediter

to carry out his duties under the Act. The Housing Expediter was served at his office in Washington. Sustaining an order of dismissal, the Court speaking through Judge Soper said on this point (p. 267):

The District Court did not have jurisdiction over the Housing Expediter because his official residence is in Washington, in the District of Columbia, and the attempted service of process upon him in the District of Columbia was ineffective to confer jurisdiction upon the court. *Butterworth v. Hill*, 114 U. S. 128, 5 S. Ct. 796, 29 L. Ed. 119; *Federal Landlords Committee v. Woods*, D. C., S. D., N. Y. 9 F. R. D. 622.

The Supreme Court denied certiorari in this case on May 1, 1950, and denied rehearing on June 5, 1950 (70 S. Ct. 805).

It is elementary, therefore, that this suit against the Housing Expediter, who resides in the District of Columbia, could not be legally maintained in the United States District Court for the District of California without his consent.

Nor is the well-settled rule discussed above different merely because of appellants' contention that the action to be performed by the government official is of a ministerial capacity, and therefore equity will regard as done what ought to be done. As was said by this Court in *United States v. Tacoma Oriental S. S. Co.*, 86 F. 2d 363, 368 (C. A. 9th):

Appellee and amici curiae both argue strongly that the proceeding is merely one to compel the performance of official ministerial duties. They thus concede that the basis of the proceeding is the breach of a ministerial duty. Their

remedy is one in personam, purely, and issuance of process by the lower court outside its district in such case is not authorized.

This decision was more recently followed in *In re Standard & Electric Co.*, 119 F. 2d 658 (C. A. 3rd).

Gibson v. Chotteau, 80 U. S. 92, and *Virginia Ship Building Corp. v. United States*, 22 F. 2d 38, 50, certiorari denied 276 U. S. 625, relied on in the *Amicus* brief filed previously, are not to the contrary. Neither case enunciates the principle that a court of equity may, in any *in personam* proceeding, exercise jurisdiction over a person who is an inhabitant of another district, or of a government official whose official residence is in another district. In each case cited above the court was dealing with a specific *res* (land in *Gibson*, and ships in *Virginia Ship Building*) as to which there was *in rem* jurisdiction. Here, the relief sought and decree, if granted, will be directed against the person of the Housing Expediter who is not a resident of California.

In appellants' brief (p. 20) reference is made to two cases decided by the Supreme Court holding that foreign corporations doing business in a state may be sued by service of process upon their agents residing in the state. Since the Housing Expediter is not a corporation, the inapplicability of these decisions is too apparent for further comment. Significantly, appellants cite no case in point. Accordingly, the court below was right in holding that it lacked jurisdiction over the Housing Expediter and that the attempted service of process upon the Housing Expe-

diter by serving the Area Rent Director in Los Angeles was wholly ineffective to confer jurisdiction.

II

Authority under Section 204 (j) (3) of the Act to terminate controls in cities is vested exclusively in the defendant, Housing Expediter, and he has the power to enforce the Act by delegation from the Attorney General. The defendant, Ben C. Koepke, Area Rent Director, is a subordinate of Tighe E. Woods who exercises no power whatever respecting termination of rent controls in cities under Section 204 (j) (3), or any enforcement powers. Any decree which contemplates enjoining the administration and enforcement of rent control in the entire City of Los Angeles because of action taken under Section 204 (j) (3) requires the Housing Expediter to be made a party to the suit. In the absence of jurisdiction over the Housing Expediter, the present action cannot be maintained against the Area Rent Director or other unnamed defendants

The complaint, as originally filed sought relief against one named defendant only, viz, the Housing Expediter. The principal relief sought was a mandatory injunction to compel the Expediter to terminate rent controls in Los Angeles. In the court below, appellants abandoned this count against the Housing Expediter. On familiar principles, having abandoned this count below, appellants are barred from raising it here on appeal.

By amended complaint, however, appellants substituted for one of the "Doe" Defendants, the name of Ben C. Koepke, Area Rent Director of Los Angeles. Appellants seek negative injunctive relief against Koepke, to restrain the latter "from issuing any orders relating to maximum rents" in Los Angeles, from interfering with any eviction proceed-

ings in Los Angeles, and from doing any act "having the effect of administering rent control in the City of Los Angeles."

Reliance by appellants upon this count requires the determination whether the Housing Expediter is an indispensable party to the action. If he is, then the action must be dismissed against Koepke, Area Rent Director and other defendants.

That the Housing Expediter is an indispensable party to the action, is clear from the fact that the extraordinary power of terminating rent controls pursuant to Section 204 (j) (3) of the Act is vested in the Expediter alone. Section 204 (j) (3) expressly provides that "The Housing Expediter shall terminate the provisions of this title in any * * * city * * *" where the requirements specified in the Act are satisfied. No one other than the Housing Expediter has been authorized to exercise this important power. Appellants in effect conceded this fact both by their allegations and prayer for relief. In these circumstances there can be no question but that any mandatory injunction to be entered in this case would bind the Housing Expediter alone and require him only to act as is prayed for in the complaint. Recognizing this fatal weakness in their case, appellants now seek to accomplish indirectly what cannot be done directly. Obviously, a decree against the Area Rent Director restraining him from enforcing and administering all rent controls in Los Angeles would have the same practical and legal effect as if the Expediter himself had been directed to terminate

rent controls in the city. That being so, there can be no escape from the conclusion that the court below correctly held that the decree sought in this case would require the Expediter "to take action, either by exercising directly a power lodged in him or by having a subordinate exercise it for him" within *Williams v. Fanning*, 332 U. S. 490; *Gnerich v. Rutter*, 265 U. S. 388 and related cases. See too, *Warner Valley Stock Co. v. Smith*, 165 U. S. 28; *Webster v. Fall*, 226 U. S. 507; *Moody v. Johnston*, 66 F. 2d 999, 1002 (C. A. 9th); *Moore v. Anderson*, 68 F. 2d 191, 193 (C. A. 9th); *May v. Maurer*, (C. A. 10th) No. 4082, Sept. Term 1950; *Berlinsky v. Woods*, 178 F. 2d 265 (C. A. 4th) certiorari denied 70 S. Ct. 805; *Jacobs v. Abern, Office of the Housing Expediter*, 176 F. 2d 338 (C. A. 7th); *Smart v. Woods* (C. A. 6th) No. 11157, Oct. 27, 1950.

The facts present in *Gnerich v. Rutter*, 265 U. S. 388, are particularly opposite to those present here. There the plaintiffs claimed that the limitation as to their sales of liquor in the permit issued them as licensed pharmacists under the National Prohibition Act was void and beyond authority vested in the prohibition commissioner by the pertinent regulations. The Commissioner of Internal Revenue was responsible for the administration of that Act. He had, *as authorized by the Act*, issued regulations which provided for and designated a prohibition commissioner as his general agent to issue and sign permits to sell liquor at retail, and which also provided for local prohibition directors to issue and sign permits to purchase liquor for use and sale under the permits

last mentioned. Plaintiffs' permit to sell liquor had been issued and signed by the prohibition commissioner, who in the exercise of the discretion vested in him by the regulations had imposed the condition complained of. Plaintiffs brought suit against the local prohibition director, who had refused to issue to them permits to purchase in excess of this limitation, seeking to restrain him from giving effect to the limitation. Although the Commissioner of Internal Revenue had delegated his authority and discretion to issue permits to the prohibition commissioner and prohibition directors, and the permit in question had been issued by the prohibition commissioner, who had imposed the limitation within the scope of the discretion delegated him, the Court, quoting *Warner Valley v. Smith, supra*, held that the Commissioner of Internal Revenue was an indispensable party to the proceeding. Mr. Justice Van Devanter speaking for the Court said (265 U. S. at 391-392):

The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the

principal one—and given opportunity to defend his direction and regulations.

From the *Rutter* decision it is clear that the superior was an indispensable party in a suit brought against a subordinate which attacked as invalid an order issued by the superior upon the ground that the superior had abused his discretion *within the scope of authority* conferred upon him by a valid statute.

In *Williams v. Fanning*, the Postmaster General after a hearing in Washington, D. C., found that petitioners' weight-reducing enterprise was fraudulent. He accordingly issued a fraud order directing the respondent, the postmaster at Los Angeles, where petitioners do business, to refuse payment of any money order drawn to the order of petitioners, to advise the remitter of such money order that payment had been forbidden, and to stamp "fraudulent" on all matter directed to petitioners, and to return it to the senders. Petitioners sued the local postmaster to enjoin him from carrying out the order. Motion to dismiss, made on the ground that the Postmaster General was an indispensable party, was granted by the lower courts. The Supreme Court reversed, and held that the motion to dismiss should be overruled. Speaking of *Guerich v. Rutter*, and related cases, the Court said (p. 493):

These cases evolved the principle that the superior officer is an indispensable party if the decree granting the relief sought will require *him* to take action, either by exercising directly a power lodged in him or by having

a subordinate exercise it for him. [Italics added.]

The Court then compared the facts and principles in those cases with the facts and principle laid down in *Colorado v. Toll*, 268 U. S. 228, and at the same time, stressed the fact that there was no conflict between these two lines of cases, since the *Toll* case involved a situation where “relief against the offending officer could be granted without risk that the judgment awarded would ‘expend itself on the public treasury or domain, or *interfere* with the *public administration*.’ *Land v. Dollar*, 330 U. S. 731, 738.” [Italics added.]

The Supreme Court went on to say that the decree in the case before it was like the decree in the *Toll* case, since it will “effectively grant the relief desired by expending itself on the subordinate official who is before the Court.” The Court declared that it was the local postmaster *alone* “Who refuses to pay money orders, who places the stamp ‘fraudulent’ on the mail, who returns the mail to the senders.” Thus, as the Court further pointed out, if the local postmaster “desists in those acts, the matter is at an end. That is all the relief which petitioners seek.” Comparing the case before it and the facts in the *Rutter* and related cases, the Court concluded as follows (p. 494) :

The decree in order to be effective need not require the Postmaster General to do a single thing—he need not be required to take new action either directly as in the *Smith* and *Fall* cases or indirectly through his subordinate as

in the *Rutter* case. *No concurrence on his part is necessary* to make lawful the payment of the money orders and the release of the mail unstamped. Yet that is all the court is asked to command. [Italics added.]

When these principles are applied to the facts in the instant case, it becomes clear that the *Rutter* and related cases should control, rather than the *Toll* case.

Here it is not the Area Rent Director who refuses to terminate rent controls in the City of Los Angeles. The Act does not confer that power upon him. Thus, if he desists, the matter is not at an end because the Housing Expediter must still terminate rent controls in the City as the Act requires, if appellants are to obtain the relief which they seek. Hence, if relief is granted bringing to an end the administration and enforcement of such control in the City of Los Angeles it would require the Housing Expediter "to take action, * * * by exercising directly a power lodged in him" and which is not lodged in anyone else.

In other cases where the facts were far less compelling for the application of the rule respecting indispensable parties than are the facts present in the instant case, both Courts of Appeals and lower courts have not hesitated to hold that the Housing Expediter is an indispensable party upon the basis of the *Fanning*, *Rutter*, and other related cases.

In *May v. Maurer* (C. A. 10th), No. 4082, Sept. Term 1950, an action was brought against Maurer, an area rent director, for an injunction and declaratory

judgment. The plaintiff prayed for judicial determination that her premises were not subject to rent control by the rent director and for injunctive relief restraining the area rent director from issuing an order fixing rent ceilings for the premises. Holding that the Expediter was an indispensable party to the action, the Tenth Circuit Court, speaking through its Chief Judge Phillips, said the following:

Here, in so far as May sought injunctive relief against the issuing or enforcement of an order by Maurer reducing the rent, an injunctive order would expend itself on Maurer, the subordinate official, and an action for that relief could be maintained without joining the Housing Expediter as a party defendant; however, that relief was only incidental to the main relief sought, which was a decree adjudicating that the leased premises were not subject to rent control and permanently enjoining the issuance of orders subjecting such premises to rent control. A decree could not effectively grant such principal relief unless it bound the Housing Expediter, and such a decree, if binding on the Housing Expediter, would interfere with the public administration of rent control. An action for such principal relief could not be maintained without joining the Housing Expediter as a party.

Another case in point is *Berlinsky v. Woods*, 178 F. 2d 265 (C. A. 4th) certiorari denied, 70 S. Ct. 805. There the plaintiff brought suit against the Housing Expediter, and Area Rent Director to compel these

defendants to recognize certain property as housing accommodations and to take steps to prevent plaintiff's eviction. In ruling that the Expediter was an indispensable party to the action, the court said, p. 267:

Since the power to administer the Housing and Rent Control Act of 1947, as amended, was lodged in the Housing Expediter under Sections 204 and 206, 50 U. S. C. A. Appendix, §§ 1894, 1896, and the purpose of the suit is to require him to take action in the exercise of his statutory powers, he is an indispensable party to the suit which cannot go on without him; and the case must therefore also be dismissed as to the Area Rent Director and the Sheriff of Baltimore City. *Jacobs v. Office of Housing Expediter*, 7 Cir., 176 F. 2d 338; *Williams v. Fanning*, 332 U. S. 490, 493, 68 S. Ct. 188, 92 L. Ed. 95.

In *Smart v. Woods*, *supra*, action was brought by a landlord against an Area Rent Director for an injunction against enforcement of an order issued by the Housing Expediter denying an appeal from an order of the Area Rent Director which established a maximum rent for the plaintiff's accommodations. The Sixth Circuit Court affirmed an order dismissing the complaint upon the ground that the Housing Expediter was an indispensable party.

In *Jacobs v. Abern*, *supra*, action was brought by a landlord against the Area Rent Director praying for a declaratory judgment that he is entitled to a 6% return on his investment. The Seventh Circuit Court affirmed a ruling that the Housing Expediter was an

indispensable party.⁶ Based upon these decisions, the relief sought and the circumstances present in this case, there can be little question but that the Housing Expediter is an indispensable party here.

There remains for consideration the authorities relied on by appellants. These are *Williams v. Fanning*, *supra*, *Koepke v. Fontecchio*, 177 F. 2d 125 (C. A. 9th) and *Hynes v. Grimes Packing Co.*, 337 U. S. 86.

Consideration of *Williams v. Fanning*, *supra*, shows that under it, the Housing Expediter is an indispensable party. *Koepke v. Fontecchio*, 177 F. 2d 125 (C. A. 9th) and *Hynes v. Grimes Packing Co.*, 337 U. S. 86, are clearly distinguishable from the facts present in the instant case

The *Fanning* case, as shown above, far from supporting appellants' contention, has been consistently construed as holding that the Housing Expediter is an indispensable party under facts even less persuasive than those involved here. As the court below held, the *Fanning* case controls the instant case because the

⁶ Other rulings in accord with the decisions cited above and holding the Expediter to be an indispensable party are the following: *Mitchell v. Bowles*, 4 O. P. A. Op. & Dec. 5161, 5163 (S. D. Cal.); *McKinley Crain v. Rose et al.* (E. D. Wis.), No. 4785, August 23, 1949 (three-judge court); *Prince v. United States* (S. D. N. Y.), No. 48-327; *Bayshore Royal Hotel Corp. v. Avirett* (S. D. Fla.), No. 1456; *Harper v. Heilman* (S. D. Ill.), No. P-1036; *Berkshire Apartment Co. v. Woods* (D. C. Mo.), No. 4892; *Thalgo Corp. v. United States* (N. D. Ohio), No. 26487; *M. H. Management Corp. v. Woods*, (E. D. N. Y.) C. A. 10441.

See, too, under other Acts, *Redlands Foothill Groves v. Jacobs*, 30 F. Supp. 995, 1009 (S. D. Cal. C. D.); *American Communications Assn. v. Schauffler*, 80 F. Supp. 400 (E. D. Pa.) (three-judge court); *Podovinnikoff v. Miller*, 179 F. 2d 937 (C. A. 3); *Beckman v. Mall et al.*, 48 F. Supp. 853 (three-judge court; Phillips, Huxman, Circuit Judges, and Hopkins, District Judge); *Neher v. Harwood*, 128 F. 2d 846 (C. A. 9th).

decree, if granted, would require the Expediter "to take action, either by exercising a power lodged in him or by having a subordinate exercise it for him * * *. Since there was discretion to be exercised by Tighe Woods, the *Fanning* case is applicable to our problem here." Moreover, the facts of the instant case involve the precise situation contemplated by the *Fanning* case where relief, if granted against the subordinate is bound to "interfere with the public administration" of an Act to prevent inflationary rents in a period of grave emergency.

The complaint in the *Fontecchio* case alleged that on March 19, 1947, the plaintiff proposed to convert certain housing accommodations into motor courts and, therefore, were occupied and utilized as motor courts. At the time that these premises were occupied and utilized as motor courts, there was in full force and effect the Housing and Rent Act of 1947, effective on July 1, 1947, which provided in Section 204 (e) (2):

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include * * *

(2) any motor court, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof.

Shortly after the enactment of the Housing and Rent Act of 1947, the Housing Expediter, through the General Counsel, issued an interpretation with respect to motor courts. He held in substance that in order that the property may be decontrolled as a

motor court, it must have been a motor court on June 30, 1947, and such interpretation was incorporated into the Controlled Housing Rent Regulation which thereby established June 30, 1947, as the test date for decontrol of motor courts.

The action was brought against the Area Rent Director for negative injunctive relief to restrain the Area Rent Director from fixing maximum rentals for the particular premises owned by the plaintiffs. The Court upon a Motion for Summary Judgment by the defendant held that the Housing Expediter was without any power and authority to issue a regulation setting June 30, 1947, as the test date of what would constitute a motor court, because *on its face the statute exempted motor courts without regard to time limitations*. The action of the lower court was affirmed by this Court. The Court held that it was unnecessary to join the Housing Expediter in a suit to enjoin the Area Rent Director where the latter's action was *ultra vires* the statute.

The *Fontecchio* case is not in point for several reasons:

1. From the face of the statute the Housing Expediter was found to be acting without authority, while here, from the face of the statute, authority to terminate controls is expressly vested in the Housing Expediter;

2. Fontecchio sought an injunction to prevent the Area Rent Director from establishing maximum rentals upon his own properties, while here plaintiffs seek a city-wide injunction which brings all rent

enforcement and administration in the City of Los Angeles to a complete halt;

3. Fontecchio's property was always exempt from the time of the enactment of the Act, while the plaintiffs' property in this case has always been under control, and in construing the statute, doubt, if any, must be resolved against the person seeking to avail himself of the exemption.⁷

Hynes v. Grimes Packing Co., 337 U. S. 86, is distinguishable upon similar grounds. In that case, an action was brought by the Hynes Packing Company and several other companies which were engaged in the commerce of fishing in Alaska to enjoin the regional director of the Secretary of the Interior from enforcing a federal regulation which prohibited commercial fishing in the waters of the Karluk reservation in Alaska. One of the questions present in that case was whether the Secretary of the Interior was an indispensable party to the action. This Court affirmed a judgment granting injunctive relief, and held that the Secretary of the Interior was "without any authority whatsoever" to exclude the plaintiffs from fishing in the Karluk Salmon run. (See, 165 F. 2d 323.) Since "all power" to act was absent, it was not a case where it could be said that the Secretary was not merely abusing his discretion and hence he was not required to be joined. This Court referred to its prior decision in *Neher v. Harwood*, 128 F. 2d 846,

⁷ *Spokane & Inland R. R. v. United States*, 241 U. S. 344, 350; *Reynolds v. Salt River Valley Water Users Assn.*, 143 F. 2d 863 (C. A. 9th); *McCauley v. Makoh Indian Tribe*, 128 F. 2d 867 (C. A. 9th).

849 (C. A. 9th) cert. denied, 317 U. S. 659, where all the leading cases were carefully analyzed into two categories.

In the two former cases the superior officer had acted under a statute which was not attacked as unconstitutional, but it was contended that the superior had in some manner *abused his discretion* and in such circumstance it was held that he should be made a party to the action in order to defend his direction and regulations. Where he was *without authority to act at all* in the premises his actions assuming to authorize action by the subordinate were of no validity and left the subordinate as the actor subject to restraint. [Emphasis supplied.]

Pointing out that in the case before it the Secretary was held to have *no authority at all* to issue the regulation, this Court held that the facts of the case brought it within *Philadelphia Co. v. Stimson*, 223 U. S. 605, in which it was held that the Secretary of War who was without authority to make a regulation, was not an indispensable party. The decision of this Court in the *Hynes* case was affirmed upon appeal, 337 U. S. 86. The Supreme Court said the following on this point (p. 86) :

At the outset the United States contends that the Secretary of the Interior is an indispensable party who must be joined as a party defendant in order to give the District Court jurisdiction of this suit. In *Williams v. Fanning*, 332 U. S. 490, the test as to whether a superior official can be dispensed with as a party was stated to be

whether "the decree which is entered will effectively grant the relief desired by expending itself on the subordinate official who is before the court." P. 494. Such is the precise situation here. Nothing is required of the Secretary; he does not have to perform any act, either directly or indirectly. Respondents merely seek an injunction restraining petitioner from interfering with their fishing. No affirmative action is required of petitioner, and if he and his subordinates cease their interference, respondents have been accorded all the relief which they seek. The issues of the instant suit can be settled by a decree between these parties without having the Secretary of the Interior as a party to the litigation.

The Supreme Court likewise agreed with this Court's ruling that the Secretary of the Interior was without authority to act at all (337 U. S. at p. 123).

Unlike the *Grimes* case, where the Secretary of Interior was "without any authority whatsoever" to act, and the *Fontecchio* case where the Housing Expediter also lacked authority to act, the statute in the instant case expressly confers upon the Housing Expediter authority to act, since it empowers him "to terminate rent control."

There are other reasons why the *Fontecchio* and *Grimes* cases are not in any respect controlling here, and why the Housing Expediter is an indispensable party under the *Fanning* case *supra*.

1. The functions which appellants are seeking to restrain, embracing as they do the enforcement and administration of rent control in the entire City of

Los Angeles, are functions which can be exercised only by the Housing Expediter and not by any of his subordinates such as an area rent director. This is, therefore, not the kind of case in which a decree if entered, would expend itself in a subordinate official who is before the Court. The subordinate official never had, and does not have, the power to decontrol the *entire* City of Los Angeles. The subordinate official does not have, and never had, the authority to refrain from administering rent control in the *entire* City of Los Angeles. While he has the power to issue individual rent orders respecting specific properties based upon information respecting those specific properties, any attempt by the area rent director to cease administering rent control in the City of Los Angeles would be an act directly contrary to his authority and would bring about his summary discharge.

2. The decree sought in this case would also attempt to restrain the area rent director from enforcing the act. However, the area rent director has no powers of enforcement whatsoever. These powers of enforcement are lodged in the United States by Sections 205 and 206 of the Act (*infra*, p. 70) and in turn delegated by the Attorney General to the Housing Expediter (14 F. R. 6097) (Section 206 (e) *infra*, p. 71). The staff of litigation attorneys in Los Angeles discharging enforcement powers are directly responsible to the General Counsel of the Office of the Housing Expediter in Washington, D. C. They are not subject in any way, shape or manner to the control or direction of the Area Rent Director, whose functions are of an

administrative character only (12 F. R. 6908, incorporating, 12 F. R. 1143, 12 F. R. 2986).

Thus, if the decree were entered in this case restraining both the administration and enforcement of rent control in Los Angeles, it would not expend itself on a subordinate official who is before the Court since he lacks authority to exercise the powers which the decree seeks to restrain. Rent controls would still be in effect in the city even if the Area Rent Director were restrained from discharging his duties. If the explicit direction of the statute itself is to be observed for controls to end, further affirmative action would still be required by the Housing Expediter to terminate controls in the City of Los Angeles. Thus too, if the Area Rent Director ceased issuing orders of adjustments as the complaint requests, an absurd and chaotic situation would result. Landlords would be subject to the burdens of rent controls in the form of maximum rents established by the existing Act, but would be barred from obtaining the benefits in the form of adjustments increasing rentals. In no event would the decree expend itself on the Area Rent Director. Concurrence on the part of the Housing Expediter would still be necessary to make decontrol effective and enforcement ineffective, unlike the *Fanning* case where no concurrence was required on the part of the Postmaster General. In addition, the restraint sought by appellants would clearly interfere with the public administration of the law since it would paralyze the administration and enforcement of rent control in the large City of Los Angeles and prohibit the Housing Expediter from carrying out the

duties imposed upon him by Congress. Hence, the issues of the suit cannot be settled in this case by a decree between the plaintiffs and the Area Rent Director without having the Housing Expediter as a party to the litigation.

Consideration of appellants' contention that the duties performed by the Expediter under Section 204 (j) (3) are ministerial and hence the action of the Area Rent Director is ultra vires the statute

Appellants claim that the *Fontecchio* case applies here so far as the action against Koepke is concerned, because the duties to be performed by the Expediter under Section 204 (j) (3) are ministerial only; that therefore his failure to terminate controls in Los Angeles after receipt of the resolution from the City Commission was an act beyond his statutory authority; and hence, any action by the Area Rent Director in Los Angeles for enforcing or administering the Act would likewise be *ultra vires*.

In the first place, if the duties to be performed under Section 204 (j) (3) of the Act are indeed ministerial, as claimed, there is an ample remedy, and that is to sue in the Federal District Court of the District of Columbia for mandamus. (See *United States v. Tacoma Oriental S. S. Co.*, 86 F. 2d 363, 368 (C. A. 9th).)

Secondly, in determining whether the Housing Expediter's functions under Section 204 (j) (3) are ministerial, it should be noted that the test is whether his duty is "so plainly prescribed as to be free from doubt and equivalent to a positive command" (Judge Albert Lee Stephens sitting by designation and speaking for the Court in *Thomas v. Vinson*, 153 F. 2d 636 (App.

D. C.). As in the *Vinson* case, *supra*, where the Court rejected plaintiff's claim that the duties of the government official were ministerial, here, too, it will be demonstrated that there is "nothing in the Acts themselves or in the facts surrounding their adoption which indicates with certainty the meaning to be placed upon them. They do not prescribe a plain, understandable, and definite ministerial duty" (*Thomas v. Vinson, supra*). And this conclusion also finds full support in the decision of the Appellate Court of the District of Columbia in *Babcock v. Woods, supra*, where the Court said:

A determination by the Expediter as to whether a resolution received by him was adopted in accordance with local law is the sort of determination which executive officials must make constantly in the administration of laws enacted by Congress.

It must therefore be manifest from a reading of the Act that the court below was right in holding that the Expediter is not merely a "highly paid clerk" or "a glorified push button." As the Court below said:

* * * The statute says that "the Housing Expediter shall terminate the provisions of this title in any incorporated city upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after ten days' notice, that there no longer exists such a shortage," and so forth.

It seems to me clear that Congress could have eliminated those matters which are now here for discussion. It could have said that the Expediter shall terminate upon receipt of a resolution by the governing body of any city that there no longer exists such shortage in rental housing accommodations.

That the Congress didn't do. They put in certain other provisions there, and it seems to me that the Housing Expediter has to determine whether this was in accordance with applicable local law.

To adopt the review that the Housing Expediter is a mere "rubber stamp" would mean that there would be no check whatever upon a local governing body to determine whether its resolution is in accordance with applicable local law. No matter how lacking in compliance with local law a resolution for decontrol was or indeed no matter how contrary it was to local law, it would nevertheless become effective, once it reached the hands of the Expediter.

This is a difficult theory to accept when we remember that the Act provides no method of recontrolling cities that have been decontrolled under Section 204 (j) (3). Hence, once decontrol action is taken under Section 204 (j) (3), it is an irretrievable course of conduct from which there is now no recall. It seems more reasonable to conclude that had Congress intended to withdraw all discretion from the Expediter, it would have been easy to do so by express language to that effect. It could, for example, have refrained from requiring that the Housing Expediter shall

terminate controls, as it did. It could have simply said, controls shall end in a city when the local governing body adopts a resolution for that purpose. Instead, Congress took pains to include the requirement that the Expediter "shall terminate" and the others for notice, public hearing in Section 204 (j) (3), and compliance with applicable local law. Unless we are to impute to Congress an intention to include in the Act meaningless words, it is difficult to escape the conclusion that Congress desired the Housing Expediter to exercise such discretion as was necessary for effectuating the purposes of the Act.

Consideration of appellants' argument that the word "shall" in Section 204 (j) (3) deprives the Housing Expediter of discretion

The appellants stress the argument that the word "shall" in Section 204 (j) (3) imposes an absolute mandate upon the Housing Expediter to terminate controls. There is no merit to this contention.

Use of the word "shall" in connection with a predecessor statute, the Emergency Price Control Act (50 U. S. C. App. 905 (a)), was considered by the Supreme Court in *Hecht Co. v. Bowles*, 321 U. S. 321. Section 205 (a) of that Act provided that injunctive relief "shall be granted" upon a showing of violation and application of the Administrator to restrain violation (*infra*, p. 71). It was there contended that the language so employed deprived the court of any discretion, and once violation was established, injunctive relief was mandatory in view of both the language used and its legislative history. Nevertheless, the Supreme Court rejected this contention,

holding that the mandatory language used did not deprive the Court of the sound discretion traditionally exercised by it, and that had Congress intended such a drastic departure it would have used an unequivocal statement to that effect (321 U. S. at 329). So too, if Congress had intended to withdraw from the Housing Expediter the usual discretionary powers traditionally exercised by an Administrator of an Act of Congress, and especially those powers which are so essential for carrying out the purposes of Congress, it would have used plainer and more appropriate language than it did to accomplish that result.

There are many other instances where the word "shall" has been construed as being merely directory rather than mandatory, particularly where such a construction involves prospective action by government officials and if the law's purpose is the protection of the public interest by guidance of government officials. Citation of merely a few other cases will illustrate this point. Thus, in *Erhardt v. Schroeder*, 155 U. S. 124, a statute was held merely to be a guide to public officers which provided, in language apparently mandatory, that the collector of the port of New York "shall" examine at least a certain proportion of shipments sent to him for examination and appraisal; and an assessment based on inspection of less than the prescribed percentage was therefore upheld.

As was said by this Court in *Rosenberg v. McLaughlin*, 66 F. 2d 271, 272 (C. A. 9th) :

The use of the word "shall," upon which great stress is laid by appellants, is not mandatory

and does not confine the collector to a single method of procedure.

Consideration of other provisions in Section 204 indicate that Congress intended to confer discretion upon the Expediter in discharging the functions under Section 204 (j) (3)

Reference to other provisions of the Act likewise suggests Congressional intent to place reliance upon discretionary action by the Housing Expediter. For example, under Sections 204 (j) (1) and (2) of the Act, (*infra*, p. 69), the Housing Expediter is required merely to make a public announcement to the effect that he has been advised by the Governor of a State of provision for State rent control (j) (1) or by the State that Federal rent control is no longer necessary (j) (2). Thereupon, rent controls in any such State become terminated. It becomes pertinent to inquire why the Congress was willing to risk the removal of Federal rent control in an entire State without permitting any degree of control in the Housing Expediter, but was unwilling to employ the same technique in the case of a unit of the State. Certainly, it is not unreasonable to conclude that the imposition of specific requirements and affirmative action by the Housing Expediter were imposed in order that some degree of substantial authority be vested in a governmental agency when the decontrol of municipalities was involved. Such an assumption would give reasonable meaning to the framework of the Act, when a contrary interpretation would suggest meaningless gestures by the Congress and the lowest form of clerical function by the Housing Expediter.

Examination of Section 204 (f) (1) (A) (50 U. S. C. App. 1894 (f) (1) (A)) also provides significant legislative comparison when viewed against the background of Section 204 (j) (3) (*infra*, p. 68). It is there provided that any incorporated community may declare "by resolution of its governing body adopted for that purpose, or by popular referendum, in accordance with local law" that a rental housing shortage exists, requiring continued control. Upon passage of such a resolution, Federal rent control is automatically extended for an additional six-month period. It will be observed that although the governing body would be dealing with the same subject matter and through the same designated method, i. e., "resolution," it merely "declares" by resolution that a shortage exists, none of the procedural requisites are imposed, and no participation by the Housing Expediter in the acceptance of the resolution is authorized by the Act.

Consideration of provision that resolution must be adopted in accordance with applicable local law

Additional inquiry also must be directed to the requirement that the resolution be "adopted for that purpose in accordance with applicable local law." As was held in *Babcock v. Woods, supra*, the right of inquiry and decision, with a necessary exercise of discretion, must be accorded before the validity of the action may be assumed. We are not here dealing simply with the word "resolution" in a vacuum. The resolution called for must meet the requirements of local law. To determine such compliance requires

consideration of the governing charter. Upon such consideration, it is found that Section 21 of the Los Angeles Charter provides that "all legislative power of the City * * * shall be exercised by ordinance * * *." Under Section 281 of the Los Angeles Charter, "no ordinance, legislative, administrative or executive, passed by the Council shall go into effect until the expiration of thirty days from its publication." Since the Los Angeles Charter speaks of "administrative or executive" ordinances, it is questionable whether the action of the City Council in dealing with rent control at least does not have the dignity of an "administrative or executive" ordinance. Initiative and referendum provisions usually apply to "matters of legislation affecting the entire city, and of a character likely to engage the attention and arouse the favor or opposition of every voter," *Hopping v. City of Richmond*, 170 Cal. 605, 150 Pac. 977, 981. If the public hearing is to be viewed as a legislative hearing, then greater reason is present to assume that a legislative act results.

While appellants assert that by using the word "resolution" Congress could not possibly have intended an action taken and clothed with the dignity of an "ordinance," the problem is not at all susceptible to such an "open and shut" construction.

We must bear in mind that a "joint resolution" of Congress has the full force and effect of law, and constitutes as binding a legislative enactment as one adopted by more usual procedures. Then too, Congress used the words "resolution in accordance with applicable law," and the term "resolution" is not a

term with a fixed or absolute meaning in law. It has been used interchangeably with such words as "ordinance," "order," "measure," and action." (See Vol. 30, Words & Phrases (Perm. Ed.), pp. 146, 152-153; Vol. 37, Ibid., pp. 408-414.)

Let us assume that the City Charter of Los Angeles required matters relating to rent control or decontrol to be dealt with by ordinance only, and expressly barred the use of a resolution for that purpose. If, in face of this explicit restriction, the City Council nevertheless adopted a resolution for the end of rent control, would the Housing Expediter be obliged to accept it and terminate controls, even though it was clear that the resolution was not "in accordance with applicable law"? The answer is that he must nevertheless do so, if we accept appellants' contentions as valid.

It is little wonder that the Appellate Court for the District of Columbia made short shrift of the decision of the lower court in *Babcock v. Woods, supra*, and directed dismissal of the complaint filed against the Housing Expediter for a mandatory injunction compelling the latter to terminate controls in the City of Los Angeles. In reversing the court below, the Appellate Court for the District of Columbia declared that action taken by the City of Los Angeles, pursuant to 204 (j) (3) was a *legislative act* which required an ordinance and all of the formalities attending it, and that the resolution adopted by it was invalid to terminate controls in the City of Los Angeles. As the Appellate Court observed, determination as to whether the resolution is in accordance with applicable local

law is not uncommon, but rather one which "executive officials must make constantly in the administration of laws enacted by Congress."

In addition, there are other aspects of Section 204 (j) (3) which unmistakably indicate that the duties of the Housing Expediter involve discretion and are in no sense ministerial.

Consideration of provisions for notice, public hearing and finding that no shortage of housing exists

Let us assume for a moment that there was no notice as required by the statute at all but that the local governing body certified it had given notice. Could it be denied that upon being advised of lack of notice, that the Housing Expediter lacked discretion to refuse to terminate controls? Let us assume for a moment that notice was given, but there was no public hearing. Could it be denied that the Housing Expediter upon being advised of the lack of public hearing, would be obliged nevertheless to end controls? Let us assume that at the hearing, all the evidence which was adduced demonstrated that there was still a vital need for rent controls and that there were no vacancies at all. Would the Housing Expediter be obliged to accept as valid a resolution that "there no longer exists such a shortage in rental housing accommodations as to require rent control in such city" when there was not a shred of evidence to support it? Surely, this would not be a finding "reached as a result of a public hearing" if it had no evidence whatever to support it. Yet, if we accept as sound, appellants' contention that the Housing Expediter

has no discretion whatever under Section 204 (j) (3) and that he is just a "rubber stamp," a resolution must be given effect regardless of whether the requirements of the Act have been satisfied or not, so long as the resolution is adopted and sent.

Thus, too, if a city council chose a place for hearing so small that no members other than themselves would be accommodated, no one would argue that a public hearing, in any sense, had been had. Yet, who is to make the inquiry and to judge the result if a city council nevertheless certifies that a public hearing was held? Or suppose that only predetermined spokesmen favoring decontrol are permitted to participate in a hearing, must the Housing Expediter, being informed of the true circumstances, blindly impose the tragedy of inflation upon tenants? If it can be agreed that in "extreme" cases, a right of investigation and decision exists, then discretion is necessarily present. Whatever may be the degree of discretion to be exercised, if it is called into play at all, the right of the Executive branch of the Government to dispose of controversial matters entrusted to its charge becomes removed from the jurisdiction of the courts.

The requirement as to findings *reached as the result of a public hearing* perhaps more forcefully illustrates the element of discretion involved in proceedings under Section 204 (j) (3).

Unless these local option provisions of the statute are to be so construed as to be capable of perpetrating a monstrous fraud upon those entitled to the protection of the Act, it is difficult to understand why the re-

sponsible Government officer to whom the Congress has entrusted the administration of Federal rent control cannot determine whether there was *any* evidence to support the findings. Obviously, findings are not reached as a result of public hearing when the public hearing is barren of *all* evidentiary basis.

Consideration of appellants' arguments based upon the legislative history of the Act

Appellants present extended argument, based upon the legislative history, in an effort to demonstrate that the Housing Expediter was vested only with the mechanical function of accepting without question a resolution under Section 204 (j) (3). Particular emphasis is placed upon an excerpt from the Senate report on the 1950 Act (S. Rep. 1780, 81st Cong., 2d Sess., on S. 3181)—and a similar statement in the House report—that “the action of the local governing body would be final and not subject to review, appeal or change by any other authority” (p. 10). In discerning the real intent of this statement, however, it is necessary to recall that under the 1949 Act, any such resolution of a local governing body was required to be forwarded to the Governor, and that official could nullify the action by veto or simply by inaction, since only he could forward the resolution to the Housing Expediter. In speaking of the 1949 and 1950 provisions of Section 204 (j) (3), the Report advised that “these provisions for decontrol would be continued with one modification, namely, that in the case of decontrol action by a governing body of an incorporated city, town, or village it would not be neces-

sary that the Governor of the State approve the resolution requesting the Housing Expediter to decontrol the community" (pp. 9-10). Then follows the sentence hereinbefore quoted as to the finality of the local body's action. When these two sentences are read together, as they must be, it becomes fully apparent that the elimination of the Governor's approval constituted the "one modification" of the 1949 provisions, and that the finality of action refers to the removal of the internal arrangement whereby a local governing body's action was subject to absolute review by the Governor. It should not be construed so as to foreclose the Housing Expediter's authority to require observance with applicable local law, as well as with the federal rent law.

In any event, the Court lacks jurisdiction to restrain the Area Rent Director from enforcing the Act since the latter has no enforcement powers whatever

It has already been observed that the Area Rent Director has no enforcement powers to restrain unlawful eviction proceedings or to sue for overcharges. It should also be noted at this point that the complaint contains no allegations that the Area Rent Director has any power to institute civil proceedings against anyone or that he is even threatening to do so. The complaint is wholly defective in this respect. Significantly, not even in the brief submitted by appellants do they claim that the Area Rent Director has any enforcement powers. At page 9 of their brief, appellants state that the Area Rent Director's office "possesses and handles complaints" of tenants upon the basis of which actions are instituted against

persons in the City of Los Angeles. Appellants also state that the area rent office issues orders reducing and fixing rents. But nowhere in the brief just as nowhere in the complaint do appellants claim that the Area Rent Director has any power to institute action for enforcement or that he has any control over the enforcement powers exercised by the litigation office in Los Angeles. In these circumstances, the authorities are clear that there is no equity jurisdiction to grant injunctive relief against the Area Rent Director restraining the latter from enforcing the Act. *Federal Trade Commission v. Claire Furnace Co.*, 274 U. S. 160; *Whitehead v. Cheves*, 67 F. (2d) 316 (C. C. A. 5th); *Yarnell v. Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5th); *City of Osceola v. Utilities Holding Corp.*, 55 F. (2d) 155, 158 (C. C. A. 8th); *Grand Trunk Western Ry. Co. v. Curry*, 162 Fed. 978, 982-983 (C. C. N. D., Cal.); *Bookbinders' Trade Ass'n v. Book Manufacturers' Institute*, 7 F. Supp. 847, 848 (S. D. N. Y.); *James v. Lake Wales Citrus Growers Ass'n*, 110 F. 2d 653 (C. A. 5).

The *Claire Furnace Co.* case, *supra*, is an apt illustration of this rule. That was a suit in the Supreme Court of the District of Columbia by a number of companies engaged in the coal, steel, and related industries to enjoin the Commission from enforcing or attempting to enforce certain orders issued by it against the complainants, requiring them to furnish certain reports. An injunction was granted as prayed. The judgment was affirmed by the Court of Appeals for the District of Columbia. The Supreme Court, however, reversed the judgment and remanded

the case to the trial court with directions to dismiss the complaint upon the following grounds, saying (274 U. S. at p. 173):

There was nothing which the Commission could have done to secure enforcement of the challenged orders except to request the Attorney General to institute proceedings for a mandamus or supply him with the necessary facts for an action to enforce the incurred forfeitures. If, exercising his discretion, he had instituted either proceeding the defendant therein would have been fully heard and could have adequately and effectively presented every ground of objection sought to be presented now. Consequently, the trial court should have refused to entertain the bill in equity for an injunction. [Italics supplied.]

In the *Yarnell* case, *supra*, the Fifth Circuit held that the district court was without jurisdiction to enjoin the Control Committee created in accordance with a marketing agreement under the Agricultural Adjustment Act from enforcing the Act, since it had no power to carry out its threats to enforce its orders (p. 439):

As the committee has no power, and so far as appears has not assumed and will not undertake to enforce either its prorated orders or its alleged threats, injunction does not lie against it. Pennsylvania R. R. Co. v. Labor Board, 261 U. S. 72, 85, 43 S. Ct. 278, 67 L. Ed. 536. [Italics supplied.]

In *Janes v. Lake Wales Citrus Growers Ass'n*, 110 F. 2d 653, the District Court had granted an injunction against enforcement of the Fair Labor Standards

Act and for declaratory judgment that petitioners were exempt from the act. The injunction restrained an inspector of the Wage and Hour Division of the Fair Labor Standards Act and also a United States attorney for the Southern District of Florida. Upon appeal, the Fifth Circuit reversed and in an opinion for the court by Judge Sibley said the following:

We are of opinion that the injunction should have been refused and the motions to dismiss granted. The evidence showed that the Administrator was preparing to enforce the act throughout the country, but that the Inspector was only an investigator, and had no power to institute suits or prosecutions.

* * * * *

If they wish a test in equity they ought to go to a jurisdiction where more responsible parties can be found.

From the foregoing, it must be manifest that Judge Carter was right in holding that Section 204 (j) (3) of the Act conferred upon the Housing Expediter discretionary powers which could not be controlled by the courts. Viewed most favorably to appellants, it may be said that the statute is not free from doubt. But even if this be so, there is brought into play the familiar rule that decisions of administrative officers which are based upon statutes which are not free from doubt, involve an exercise of discretion. Insofar as an administrative determination based on the exercise of such discretion is not unreasonable or plainly wrong, the courts will not interfere either by injunction or mandamus. *Decatur v. Paulding*, 14 Peters 497; *Hall v. Payne*, 254 U. S. 343; *Ness v. Fisher*, 223

U. S. 683; *Eccles v. Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426; *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U. S. 604; *United States v. Ickes*, 98 F. 2d 271 (App. D. C.), cert. denied 305 U. S. 619; *Brunswick v. Elliott*, 103 F. 2d 746 (App. D. C.); *Reichelderfer v. Johnson*, 72 F. 2d 552 (App. D. C.); *Riverside Oil Co. v. Hitchcock*, 190 U. S. 316; *Wilbur v. United States*, 281 U. S. 206; *Adams v. Nagle*, 303 U. S. 532; *White v. Coe*, 95 F. 2d 347 (App. D. C.).

In no respect can this case be said to fall within the test laid down in *Thomas v. Vinson*, supra, that the Act directs "a plain, understandable and definite ministerial duty" or that it is "so plainly prescribed as to be free from doubt and equivalent to a positive command (153 F. 2d at p. 639).

Since the court below lacked jurisdiction over the Housing Expediter and since he is an indispensable party to the action, the court below properly dismissed the action against the Area Rent Director and other defendants.

III

The judgment below should be affirmed because the action is in effect one against the United States which has not consented thereto

This action must be dismissed as a suit against the United States which cannot be sued without its consent. "No principle is better established than that the United States may not be sued in the courts of this country without its consent * * *. That the United States is not named on the record as a party is true. But the question whether it is in legal effect

a party to the controversy is not always determined by the fact that it is not named as a party on the record, but by the effect of the judgment or decree which can be rendered." *Louisiana v. McAdoo*, 234 U. S. 627, 628, 629. See also, *Transcontinental & Western Air v. Farley*, 71 F. 2d 288, 290 (C. C. A. 2d), certiorari denied, 293 U. S. 603.

Any judgment or decree which can be rendered restraining enforcement of the act in this case will plainly effect the rights of the United States. Section 205 of the act expressly confers upon the United States the right to sue for statutory damages (*infra*, p. 70). Section 206 (b) of the act expressly confers upon the United States the right to sue for injunctive relief which includes the right to restrain unlawful evictions (*infra*, p. 70). Thus, all of the enforcement powers under the act are vested in the United States and any action which seeks an interference with those powers is of necessity an action against the United States.

It has long been recognized that the sovereign's immunity from suit extends to attempts to interfere with its institution of litigation. *Hill v. United States*, 9 How. 386; *United States v. McLomore*, 4 How. 286. Directly applicable here is the holding of the Supreme Court in the case of *In re Ayers*, 123 U. S. 443. There suit was brought to prevent actions by State officials to recover taxes. In holding the suit not maintainable because it was in effect one against the State, the Court said (p. 497): "The acts sought to be restrained are the bringing of suits by the State of Virginia in

its own name and for its own use.” Furthermore, as a matter of substance even prior to the inclusion of the provisions of the act referred to above, which conferred the right to sue upon the United States, this Court and other courts considered actions for enforcement under the act as one brought by the United States even though the nominal plaintiff was formerly the Price Administrator and his successor. Cf. *United States v. Koike*, 164 F. 2d 155 (C. A. 9th); *Fleming v. Findlay*, 165 F. 2d 79 (C. A. 9th); *Fleming v. Goodwin*, 165 F. 2d 334 (C. A. 8th).

In addition, the grave need for the continuation of rent control was made clear by Congress in its declaration of policy under Section 201 (b) of the Act, when it declared that it “recognizes that an emergency exists and that, for the prevention of inflation and for the achievement of a reasonable stability in the general level of rents during the transition period, as well as the attainment of other salutary objectives of the above-named Act, it is necessary for a limited time to impose certain restrictions upon rents charged for rental housing accommodations in defense-rental areas.” With this vital public welfare at stake, it is plain that the Government is the real party in interest and the attempt made here to prevent Government officials from discharging their statutory responsibilities is in reality a suit against the United States.

This conclusion is thoroughly supported by controlling decisions of the Supreme Court and lower courts. *Naganab v. Hitchcock*, 202 U. S. 473; *Wells*

v. *Roper*, 246 U. S. 335; *United States v. Griffin*, 303 U. S. 226;⁸ *Mine Safety Appliances Co. v. Forrestal*, 326 U. S. 371; *Goldberg v. Daniels*, 231 U. S. 218.

Even though the action in this case is against officers or agents of the United States, it is not one to enjoin individual action contrary to law, but rather a suit to restrain an officer of the Government in performance of his official duties from enforcing the Act and, therefore, it is an action against the United States. *Larson v. Domestic & Foreign Commerce Corporation*, 337 U. S. 682; *Miller v. Woods*, No. A30-554 (Mun. Ct. D. C.). As was said by Chief Judge Barse in *Miller v. Woods* where the tenants sued the Housing Expediter to restrain him from terminating controls in Los Angeles:

The United States must, of course, perform the functions specified under the Housing and Rent Act of 1947, as amended, by and through its officers and agents. There can be no reasonable doubt or question that the Housing Expediter, in performing the duties specified in said Section 204 (j) (3), does so as an officer and agent of the United States in his official capacity as Housing Expediter. It follows

⁸ Suit to restrain Secretary of the Interior from carrying out the provisions of the Act of June 27, 1902, controlling the disposition of pine lands ceded by the Indians is, in effect, a suit against the United States (*Naganab v. Hitchcock*, 202 U. S. 473).

Suit to enjoin Postmaster General from annulling contract for collecting and delivering mail in Washington, deemed one against the United States (*Wells v. Roper*, 246 U. S. 355).

Suit to set aside an order of Interstate Commerce Commission concerning railway mail pay is not primarily one against the Commission, but is primarily against the United States (*United States v. Griffin*, 303 U. S. 226).

that the instant suit against the Housing Expediter, is, in legal effect, a suit against the United States. The United States, as a sovereign had not given its consent to be sued in such matters. This doctrine has been recently considered at some length in an analogous case, *Larson v. Domestic and Foreign Commerce Corporation*, 337 U. S. 682, 69 S. Ct. Rep. 1457, wherein the foregoing principles are reiterated and affirmed.

In *Goldberg v. Daniels*, 231 U. S. 218, the Court had before it the contention similar to that involved here, that the duty to be performed by the government official was ministerial in character. Plaintiff complained that the Secretary of Interior refused to accept the highest bid for a surplus war vessel. The plaintiff argued that "The minute the bids were opened and his proposal or bid was ascertained to be the highest" the requirements of law had been met; that no right to reject bids had been reserved by statute; and that the Secretary could sell only in this manner. The Secretary's defense was that he could accept the bid or not as his discretion dictated. The Court speaking through Mr. Justice Holmes stated that there was an earlier point in logic for decision: "The United States * * * cannot be interfered with behind its back and, as it cannot be made a party, this suit must fall."

This decision was recently followed in the *Larson* case, *supra*, 337 U. S. 682.

It is submitted that this is the clearest kind of case in which the doctrine should be invoked as a jurisdictional bar to the action. While this contention was

not raised in the court below, since it relates to jurisdiction, it may be considered at this time even on the Court's own motion (*United States v. Griffin*, 303 U. S. 226; *Clark v. Paul Gray Inc.*, 306 U. S. 583, 590). In *United States v. Griffin*, *supra* "jurisdiction was not challenged" below (p. 228) but dismissed by the Supreme Court speaking through Mr. Justice Brandeis upon the ground that "a suit under the Urgent Deficiencies Act to set aside an order concerning mail pay is not primarily one against the Commission. Primarily, it is a suit against the United States. And the United States can be sued only when authority so to do has been specifically conferred" (pp. 238-239).

IV

Plaintiffs have no standing to sue, or right to judicial review

In the first place, the appellants who sue here as Directors and members of the Small Property Owners League have no standing to sue here. The League does not assert any common or undivided interest in any fund or property. It does not disclose any authorization to sue on behalf of its members or to incur liability for suits brought by it. The League does not allege that it personally has been harmed or aggrieved in any way by the alleged wrongful action of the defendants. It is clear that the League asserts no legal right which has been injured and therefore it has no standing to complain.

An analogous case is *Moffat Tunnel League v. United States*, 289 U. S. 113. In that case the com-

plainants, an unincorporated voluntary association, brought suit against the United States, the Interstate Commerce Commission and a railroad to set aside an order of the Commission authorizing the railroad to acquire control of another railroad. The complainant was an association organized for the purpose of assisting in the development of adequate transportation facilities in the counties through which the railroads ran. It purported to represent clubs, towns, and irrigation companies and two counties. Sustaining an order of the District Court dismissing the complaint, the Supreme Court said (pp. 118-119):

These leagues are not corporations, quasi-corporations, or organized pursuant to or recognized by any law. Neither is a person in law and, unless authorized by statute, they have no capacity to sue. * * * There is no federal statute that purports to give any unincorporated voluntary association standing to bring suit to set aside an order of the Commission. * * * The Act does not specify the classes of persons, natural or artificial, who may sue, or what shall constitute a cause of action for setting aside of an order. But it does require that the petition shall set forth "the facts constituting petitioner's cause of action," and by other provisions shows that for failure so to do the suit shall be dismissed. *Id.*, § 45. Consequently the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order. * * * Plaintiffs have failed to show that they are so qualified. Their interest is not a legal one.

Still another analogous case is *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F. 2d 79 (App. D. C.). This was an appeal from an order of the District Court for the District of Columbia dismissing the complaint of the *Joint Anti-Fascist Refugee Committee* (an unincorporated association alleged to be engaged in raising funds for relief of anti-fascist refugees) against the Attorney General, the chairman of the Loyalty Review Board of the United States Civil Service Commission and other members of the Board. The plaintiff Committee sought a declaratory judgment that Section 9 (a) of the Hatch Act as applied by the Executive Order of the President and the order itself were unconstitutional and that the action of the Attorney General in designating and listing the plaintiff as subversive had caused the Committee loss of reputation, and other irreparable damage. The Committee claimed that the Attorney General had made the designation complained of without a hearing and that the plaintiff had been denied due process of law. In addition to declaratory relief, the plaintiff requested a broad injunction to annul the alleged illegal acts of the Attorney General and the Board. The District Court granted a motion to dismiss upon the ground that the complaint failed to state a justiciable controversy and also that it did not state a claim upon which relief could be granted. The appellate court affirmed the ruling below dismissing the complaint. Among other reasons for sustaining the judgment below, the appellate court adverted to the fact that the Committee could not seek redress in the court for alleged impairment of its

members' constitutional rights, since these rights are personal to the individual members. In this connection the Court said (p. 83):

If the Committee means to assert claims in behalf of its members reputedly disgraced by reason of the designation, it is enough to point out that only the members themselves are entitled to complain of any personal injuries they may suffer. Likewise, only the members, not the Committee, can seek redress for alleged impairment of members' constitutional rights of freedom of speech and assembly. Those rights are personal to the individual members. Cf. *Hague v. C. I. O.*, 1939, 307 U. S. 496, 527, 59 S. Ct. 954, 83 L. Ed. 1423; *Northwestern National Life Ins. Co. v. Riggs*, 1906, 203 U. S. 243, 255, 27 S. Ct. 126, 51 L. Ed. 168, 7 Ann. Cas. 1104; *Western Turf Ass'n v. Greenberg*, 1907, 204 U. S. 359, 363, 27 S. Ct. 384, 51 L. Ed. 520.

A more difficult question presented is whether the plaintiffs, Hess and Westberg, as individuals, have any standing to sue in this case. In determining this question, the test is not whether these individual plaintiffs have sustained a loss or are "aggrieved" or "interested" parties but whether they show a violation of some legally protected right (*United States v. Public Utilities Commission*, 151 F. 2d 609, 613; *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 125). As was said in the last cited case (310 U. S. at p. 125):

It is now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights

in the absence of constitutional legislation recognizing it as such. * * * Respondents, to have standing in court, must show an injury or threat to a particular right of *their own*, as distinguished from the *public's* interest in the administration of the law. [Italics ours.]

With these principles in mind, we turn to the complaint. What is the gist of the complaint when analyzed? In sum, it is that the Housing Expediter has failed to discharge his duties under the Act to the public generally. This is not enough upon which appellants may rest their suit in this case. At most, it may possibly be argued that under the circumstances mentioned, the Housing Expediter may be answerable to the city which adopted the resolution of decontrol. However, since the City has not seen fit to sue here, there is no need to reach or decide the question of its capacity to sue at this time.

In addition, it may be seriously questioned whether any of the plaintiffs have any right to judicial review where the Housing Expediter has exceeded his statutory authority under Section 204 (j) (3). The statutory scheme of the Act would appear to be opposed to this view. In the same section of the Act as Section 204 (j), but in a different subsection (Section 204 (e) (1)), provision is made for decontrol of defense rental areas by local advisory boards. Recommendations of these local advisory boards are sent to the Housing Expediter for approval or disapproval. Section 204 (e) further provides that after action has been taken by the Housing Expediter, "any representative group of interested parties or

the local board'' may review the recommendation in the Emergency Court of Appeals (*infra*, pp. 65-68).

It may therefore be argued with some force, that since Congress expressly provided a right of judicial review for "interested parties" respecting decontrol dispositions by local boards under Section 204 (e), but was silent respecting judicial review of decontrol action by cities under Section 204 (j) (3), that Congress did not intend to provide judicial review for landlords or tenants in the latter case (cf. *Switchmen's Union v. Board*, 320 U. S. 297; *Stark v. Wickard*, 321 U. S. 288, 306).

It is significant also to observe, that at no point in the rather extensive debates on the 1949 and 1950 Acts did Congress either make plain that the right to judicial review exists for landlords or tenants where decontrol is proposed under Section 204 (j) (3), or by necessary inference suggest that such authority should be read into the statute. On the contrary, the legislative history of the 1950 Act demonstrates an intention not to provide a right of judicial review for landlords even in those cases where they are deprived of a "fair net operating return" provided for by Section 204 (b) of the Act (50 U. S. C. App. 1894 (b)). On June 13, 1950, prior to enactment of the 1950 Act, and while the proposed Bill was in debate on the floor, Congressman Jacobs offered an amendment providing a right of judicial review in those cases (Cong. Rec. 8665, June 13, 1950). After debate, the amendment was rejected (*Ibid.*, 8666-8667). It is therefore difficult to conclude that the appellants herein have any right to relief by the Courts in a case of this character.

V

The complaint fails to state a claim upon which relief may be granted

Finally, the complaint should be dismissed because it fails to state a claim upon which relief may be granted.

1. The court below held the action was premature. At the time of the ruling below, this was correct. Since the Housing Expediter has now rejected the city resolution, the action is no longer premature.

2. The complaint is based upon the premise that the resolution adopted by the City Council of Los Angeles was valid and as such had the effect of terminating rent controls regardless of whether or not the Housing Expediter terminated controls. In view of the decision of the Appellate Court for the District of Columbia in *Babcock v. Woods*, supra, holding the resolution to be invalid, and since the City of Los Angeles intervened in the action and is bound as a party by the decision rendered in it, the premise respecting the validity of the resolution of the City Council no longer has any foundation. Since the premise falls, appellants' case based thereon cannot stand either.

3. It would also appear that appellants no longer qualify for injunctive relief. Injunctive relief is a preventive remedy for the future, not as punishment for the past. "The historic injunctive process was designed to deter, not to punish" (*Hecht Co. v. Bowles*, 321 U. S. 321, 329). Injunction will not issue to prohibit the doing of things that have already been

done (*Femmer v. City of Juneau*, 97 F. 2d 649 (C. A. 9th)). As matters stand now, it is difficult to see how injunctive relief would aid the appellants for the future. Merely one more month of federal rent control remains for tenants of Los Angeles. In view of the 30-day notice provision for increased rent under local law, landlords would be required to wait in any event until January 1951 to be entitled to receive more than the present maximum rental in any event.

Thus the two individual appellants will not sustain any loss of rent income if matters are left in status quo. Second, while they claim they can now sell their properties at highly appreciated values, if freed from control, there is no reason to believe that prices for their property will be lower on January 1, 1951, when rent controls are due to be lifted. The contrary is to be expected as a simple matter of the laws of supply and demand, since pressures are bound to be greater than ever for purchasing homes at that time.

Appellants' contention is, however, that if injunctive relief is granted, the court's ruling would constitute an adjudication that they were free from all violations from August 1950 when the Council approved the resolution until now. It is not a basis for invoking the aid of a court of equity to grant injunctions in order to allay fears of suit.

For all that appears here, the individual appellants may not ever be sued because they may not have violated. While appellants in prior oral argument suggested the possibility of action against them for violation of the Act from the time the City Council adopted its resolution, certainly there is no allegation

in the complaint that appellants have disobeyed existing rent ceilings and seek protection from this Court for their past wrongs or that suit is being threatened. We may not go outside the record to conjure up violations which are not alleged or which may not exist. And we have no right to give any consideration here to the possibility that other landlords, not parties to this suit, have flouted the law since the City Council acted. It is equally clear that injunctive relief should not be granted on the remote and speculative premise that appellants have either violated or that some other landlords, not parties to the suit, have violated during the last six months. For these reasons, the possibility of future enforcement of the Act as to these landlords is too uncertain and contingent to warrant judicial determination. Cf. *Eccles v. People's Bank of Lakewood Village*, 333 U. S. 426, 431.

4. In addition, appellants have an adequate remedy at law. They can test the validity of the Housing Expediter's action by proceeding as if federal rent control has terminated. If and when sued for overcharges or injunctive relief, they can set up as a defense the very contentions advanced to the court below and to this Court that decontrol under Section 204 (j) (3) is self-executing (Cf. *F. T. C. v. Claire Furnace Co.*, 274 U. S. 160; *S. J. Groves & Sons Co. v. Warren*, 135 F. 2d 264 (App. D. C.), cert. den. 319 U. S. 766; *Bell Oil & Gas Co. v. Wilbur*, 50 F. 2d 1070, 1071 (App. D. C.); *Campbell v. Medalie*, 71 F. 2d 671, 672 (C. A. 2d)).

As was said in *F. T. C. v. Claire Furnace Co.*, *supra* (274 U. S. at p. 174):

Until the Attorney General acts, the defendants cannot suffer, and when he does act, they can promptly answer and have full opportunity to contest the legality of any prejudicial proceeding against them. That right being adequate, they were not in a position to ask relief by injunction. The bill should have been dismissed for want of equity.

5. Moreover, appellants have not alleged facts constituting such irreparable injury as will justify a court of equity in granting the extraordinary remedy of injunctive relief or mandamus against a government official such as is prayed for here. (Cf. *Coffman v. Federal Laboratories, Inc.* (United States, Intervenor, 55 F. Supp. 501, at 506 (D. C. N. J. 3 judge court) aff'd sub. nom. *Coffman v. Breeze Corporations*, 323 U. S. 316); *Boston Wool Trade Association v. Snyder*, 161 F. 2d 648 (App. D. C.).)

What is the damage the individual appellants assert they will sustain as a result of the alleged unlawful action of appellees? It is that their rent rolls may be decreased and that they may not be able to sell their property for all that the traffic will bear in an uncontrolled rental market. Thus plaintiff Hess alleges she can sell her property now valued at \$18,000 for \$30,000 if rent controls are lifted; and that her rents will be slightly more than 100% higher upon decontrol (Par. 9 of Complaint). Plaintiff Westberg alleges that his property now valued at \$5,000, would appreciate 400% or \$20,000 if controls are lifted, and that his rents could be raised slightly less than 100% in a market free from control (Par.

II of 2nd cause of action p. 12 of Complaint). The net sum and effect of these allegations is that the alleged unlawful action of the appellees is preventing these two individual appellants from making a "killing" in a tight rental market.⁹ Be that as it may, and assuming the money damage as alleged, it is not such damage which a court of equity will consider as irreparable. As was said in *Boston Wool Trade Association v. Snyder*, 161 F. 2d 648, 82 U. S. App. D. C. 144 "Appellants urge irreparable damage, but the damage is a money damage, consisting of the difference between the duties under the two paragraphs of the Act * * *. Such damage is not regarded by equity as irreparable" (p. 649).

VI

The court below properly exercised its equitable discretion in refusing to grant either the temporary restraining order or the preliminary injunction.

If the motion to dismiss the complaint was properly granted, it necessarily follows that the court below was equally right in denying the application for temporary restraining order and injunction. However, even if it could possibly be said that error was committed in granting the motion to dismiss, it is plain that the court below acted well within its equitable discretion in refusing to grant preliminary injunctive relief in this case. (Cf. *Hecht Co. v. Bowles*, 321

⁹ It should be noted that the Act and Rent Regulations do not prohibit landlords from selling their property. They can sell now. Landlords are merely prohibited from evicting tenants for purposes of selling their property. See *Woods v. Durr*, 176 F. 2d 273 (C. A. 3d).

U. S. 321; *Bowles v. Huff*, 146 F. 2d 428 (C. A. 9th); *Porter v. Lux*, 157 F. 2d 756 (C. A. 9th).

From earliest times, this Court has repeatedly held that the granting or refusal of temporary injunction rests in the District Court's discretion, the exercise of which in the absence of manifest abuse, is not reviewable (*Southern Pac. Co. v. Earl*, 82 Fed. 690, 692 (C. A. 9th)). "A decree of a district court, denying an injunction, should not be reversed unless shown to be contrary to some recognized rule of equity or be the result of an improvident exercise of judicial discretion" (*Bowles v. Huff*, *supra* at p. 431). It was said in *Alabama v. United States*, 279 U. S. 229, 230-231, where the District Court denied an application for a preliminary injunction to set aside orders of the Interstate Commerce Commission:

* * * It is well established doctrine that an application for an interlocutory injunction is addressed to the sound discretion of the trial court; and that an order either granting or denying such an injunction will not be disturbed by an appellate court unless the discretion was improvidently exercised. * * *

And in *Hurley v. Kincaid*, 285 U. S. 19, Justice Brandeis speaking for the Supreme Court said (p. 104, footnote 3):

Even where the remedy at law is less clear and adequate, where large public interests are concerned and the issuance of an injunction may seriously embarrass the accomplishment of important governmental ends, a court of equity acts with caution and only upon clear

showing that its intervention is necessary in order to prevent an irreparable injury.

From these authorities and the facts of this case, the court below unquestionably acted well within its sound equitable discretion in denying injunctive relief.

CONCLUSION

The decision of the court below is clearly right. Appellants' contentions to the contrary are lacking in merit. The order of the court below should be affirmed in all respects.

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APPENDIX

THE HOUSING AND RENT ACT OF 1947, AS AMENDED

(Public Law 129, Eightieth Congress, approved June 30, 1947, as amended by Public Law 422, Eightieth Congress, approved February 27, 1948, Public Law 464, Eightieth Congress, approved March 30, 1948, Public Law 31, Eighty-first Congress, approved March 30, 1949, and Public Law 574, Eighty-first Congress, approved June 23, 1950.)

SEC. 204. (d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c).

(e) (1) The Housing Expediter is authorized and directed to create and, if necessary, continue in existence until the termination of this Act in each defense-rental area (whether or not under Federal rent control) or such portion thereof as he may designate, local advisory boards. The Housing Expediter shall, whenever in his judgment there is need therefor, create a local advisory board in any part of an area designated under the provisions of the Emergency Price Control Act of 1942, as amended, prior to March 1, 1947, as an area where defense activities have resulted * * *.

Any local board may make such recommendations to the Housing Expediter as it deems advisable with respect to the following matters:

(A) Removal of any or all maximum rents in the area, or any portion thereof, over which the local board has jurisdiction, or with respect to any class

of housing accommodations within such area or any portion thereof, if in the judgment of the local board the need for continuing maximum rents in such area or portion thereof or with respect to such class of housing accommodations no longer exists, due to sufficient construction of new housing accommodations or when the demand for rental housing accommodations has been otherwise reasonably met; and

(B) Adjustments, other than individual adjustments, in maximum rents in such area or any portion thereof or with respect to any class of housing accommodations within such area or any portion thereof, deemed by the local board to be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title; and

(C) Operations generally of the local rent office with particular reference to hardship cases. * * *

SEC. 204 (e) (3) Upon receipt of any recommendation from a local board, the Housing Expediter shall promptly notify the local board, in writing, of the date of his receipt of such recommendation. Except as provided hereinafter in this subsection, within thirty days after receipt of any recommendation of a local board such recommendation shall be approved or disapproved or the local board shall be notified in writing of the reasons why final action cannot be taken in thirty days. Any recommendation of a local board appropriately substantiated and in accordance with applicable law and regulations shall be approved and appropriate action shall promptly be taken to carry such recommendation into effect. If the Housing Expediter approves or disapproves any recommendation of a local board he shall promptly notify the local board in writing of such action.

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Any representative group of interested parties or the local board may file a complaint concerning such recommendation with the Emergency Court of Appeals within thirty days after the date on which the Housing Expediter notifies the local board of his decision, or the date of the expiration of such thirty-day period, as the case may be. If the Housing Expediter holds the hearing, such group may file a complaint with the Emergency Court of Appeals within thirty days after the rendering of his decision, or within thirty days after the expiration of the time within which his decision should be made. A similar right of appeal shall be afforded in the event the Housing Expediter makes a decision as to a general adjustment or as to removal of maximum rents for any class of housing accommodations (other than for luxury housing accommodations under the second sentence of section 204 (c)) on his own initiative. The Clerk of the Emergency Court of Appeals shall notify the Housing Expediter in writing of the filing of any such complaint promptly after it has been so filed. Within fifteen days after the receipt of such notice by the Housing Expediter, the Housing Expediter shall file such recommendation or decision in the Emergency Court of Appeals, together with the record and statement of findings of the local board or of the Housing Expediter and such statement as the Housing Expediter may desire to make as to his views on the matter. The statement of the Housing Expediter may be accompanied by such supporting information as the Housing Expediter deems appropriate. Thereupon, the Emergency Court of Appeals shall have jurisdiction to enter, within sixty days after the date of its receipt of such recommendation or decision from the Housing Expediter (or within such additional period of not more than thirty days

as the court may find necessary in exceptional cases), an order approving or disapproving the recommendation of the local board or decision of the Housing Expediter. The recommendation, record, and statement of findings of the local board or decision, record, and statement of findings of the Housing Expediter, as the case may be, together with the statement and supporting information filed by the Housing Expediter, shall constitute the record before the court.

SEC. 204 (f) (1) The provisions of this title, except section 204 (a), shall cease to be in effect at the close of December 31, 1950, except that they shall cease to be in effect at the close of June 30, 1951—

(A) in any incorporated city, town, or village which, at a time when maximum rents under this title are in effect therein, and prior to December 31, 1950, declares (by resolution of its governing body adopted for that purpose, or by popular referendum, in accordance with local law) that a shortage of rental housing accommodations exists which requires the continuance of rent control in such city, town, or village; and

(B) in any unincorporated locality in a defense-rental area in which one or more incorporated cities, towns, or villages constituting the major portion of the defense-rental area have made the declaration specified in subparagraph (A) at a time when maximum rents under this title were in effect in such unincorporated locality.

(2) Any incorporated city, town, or village which makes the declaration specified in paragraph (1) (A) of this subsection shall notify the Housing Expediter in writing of such action promptly after it has been taken.

(j) (1) Whenever the governor of any State advises the Housing Expediter that the legislature of such State has adequately provided for the establish-

ment and maintenance of maximum rents, or has specifically expressed its intent that State rent control shall be in lieu of Federal rent control, with respect to housing accommodations within defense-rental areas in such State and of the date on which such State rent control will become effective, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this Act, as amended, with respect to housing accommodations within such State shall be terminated as of the date on which State rent control is to become effective. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(2) If any State by law declares that Federal rent control is no longer necessary in such State or any part thereof and notifies the Housing Expediter of that fact, the Housing Expediter shall immediately make public announcement to the effect that he has been so advised. At the same time all rent controls under this act, as amended, with respect to housing accommodations within such State or part thereof shall be terminated on the fifteenth day after receipt of such advice. As used in this subsection, the term "State" means any State, Territory, or possession of the United States.

(3) The Housing Expediter shall terminate the provisions of this title in any incorporated city, town, village, or in the unincorporated area of any county upon receipt of a resolution of its governing body adopted for that purpose in accordance with applicable local law and based upon a finding by such governing body reached as the result of a public hearing held after ten days' notice, that there no longer exists such a shortage in rental housing accommodations as to require rent control in such city, town, village, or

unincorporated area in such county: *Provided*, That where the major portion of a defense-rental area has been decontrolled pursuant to this paragraph (3), the Housing Expediter shall decontrol any unincorporated locality in the remainder of such area.

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment (or shall be liable to the United States as hereinafter provided), for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amounts of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation: *Provided*, That if the person from whom such payment is demanded, accepted, or received either fails to institute an action under this section within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the United States may institute such action within such one-year period.

SEC. 206. (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which con-

stitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

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(e) The principal office of the Housing Expediter shall be in the District of Columbia, but he or any duly authorized representative may exercise any or all of his powers in any place and attorneys appointed by the Housing Expediter may, under such authority as may be granted by the Attorney General, appear for and represent the United States in any case arising under this Act.

Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. 905 (a)):

ENFORCEMENT

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.



